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# ONTARIO PRACTICE REPORTS,

BY

3147

T. T. ROLPH,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

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CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

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VOL. X.

CONTAINING THE CASES DETERMINED,  
WITH A TABLE OF THE NAMES OF CASES REPORTED,  
A TABLE OF THE NAMES OF CASES CITED,  
A TABLE OF THE SECTIONS AND RULES OF O. J. A. AND G. O. CHY. CITED,  
AND A DIGEST OF THE PRINCIPAL MATTERS.

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ENTERED according to Act of Parliament of Canada, in the year of our Lord  
one thousand eight hundred and eighty-five, by THE LAW SOCIETY OF UPPER  
CANADA, in the Office of the Minister of Agriculture.



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## DARLING V. DARLING.

### *Production of Document.—Delivery out after inspection.*

The object of the production of documents in actions, is to enable either party to discover the existence and acquire a knowledge of the contents of the deeds and writings relevant to the case : and when that object is accomplished the documents will go back to the custody of the party producing them.

The master has a discretion to direct parties to leave documents in his office so long as any useful purpose may be answered by their remaining there, and then to allow the party producing them to take them back.

[April 10, 1883.—*The Master in Ordinary.*]

THIS was an application by the defendant for the delivery out to him of certain account books brought into the Master's office in March, 1882, pursuant to an order for production.

*Bain*, for the defendant, filed an affidavit showing that the books were material to the defendant's business in Montreal.

*W. Barwick*, contra, objected on the grounds that the defendant intended to remove the books to Montreal, out of the jurisdiction of the Court, and that the books showed that they had been tampered with, leaves having been torn out and balances altered.

MR. HODGINS, Q. C., MASTER IN ORDINARY,—The jurisdiction of the Court in ordering the production of documents evidently comes from the *actiones ad exhibendum* of the Roman Law, which enabled the owner of a thing in the possession of another to compel its production or

exhibition, so as to enable the owner to establish his claim to it: *Sanders's Justinian*, p. 191.

This Court by its order enables either party to an action to discover the existence and acquire a knowledge of the contents of the deeds and writings relevant to the case, which are in the possession or power of the opposite party; that is, a discovery in aid or for the purpose of proof so far as relates to the party's case.

When the object of the production is accomplished, it may be reasonably inferred that the Court will not constitute itself the custodian of such documents or impound them in the interest of either party, and the cases bear out this view.

In *Small v. Attwood*, 1 Y. & C. Ex. 37, the Court held that when books, &c., were brought into Court for the inspection and examination of the plaintiff, that object having been answered, the books should go back to the custody of the party producing them; and that if subsequently required for the purposes of any inquiries directed by the decree, the Master would use his discretion in requiring them to be produced in his office.

But the plaintiffs ask that in consequence of the way in which the books have been tampered with, they should be impounded until the inquiry is terminated. *Beckford v. Wildman*, 16 Ves. 483, is against this proposition. In that case a bill was filed to set aside two conveyances of the Quebec plantations in Jamaica, and a motion was made that these instruments should be deposited with the Master for safe custody, on the ground that there were material variations between them. Lord Eldon refused the motion, stating that where the object of the suit was to destroy the deed, the plaintiff had a right to have it produced and left in the hands of the Clerk of the Court for the usual purposes of inspection, &c.; that although the variations complained of did exist, he would not order the deeds to be deposited or impounded for safe keeping,—no case of danger that they would not be produced at the hearing having been established.

In *Walker v. Cooke*, 3 Y. & C. Ex. 277, a motion was made to re-deliver to the defendant certain bills of exchange and promissory notes which had been deposited by him in Court under the usual order. The motion was opposed on the ground that the plaintiff was advised to take criminal proceedings against the defendant in respect of such bills and notes—the plaintiff denying the genuineness of his apparent endorsement to one of the notes. Alderson, B., said he would make no order then; but directed that the bills and notes should remain a reasonable time in Court to see whether the plaintiff who was attacking their genuineness would take the intended criminal proceedings against the defendant.

As to the books being taken out of the jurisdiction, *Gabbett v. Cavendish*, 3 Swans, 267, may be referred to, where, on proof that certain books in Dublin “were of consequence to the business carried on there,” Eyre, C. B., declined to order their production in London, but directed that the defendant should deliver a schedule, upon oath, of the papers in Dublin, and that the plaintiff should have copies of all such as he pleased. It is proved here that the books now asked for are material to the defendant’s business in Montreal.

The case of *Sidden v. Liddiard*, 1 Sim. 388, decides what is the jurisdiction of the Master in similar cases. In that case Sir Anthony Hart, V. C., after consultation with Lord Lyndhurst, L. C., and Sir John Leach, M. R., held that under the usual order for the production of documents in the Master’s office, the Master was at liberty to direct either party to leave them in his office so long as he thought any useful purpose might be answered by their remaining there, and then to allow the party producing to take them back. See, also, *Hanna v. Dunn*, 6 Madd. 340, and Cons. Ch. Orders 222.

In *Ex parte Clarke*, Jac. 389, the documents produced in the Master’s Office were directed to be retained until a proper inspection of them was obtained; and six weeks was allowed for that purpose. Here the books have been



in the office for above a year; but in case the plaintiffs desire a further inspection they may be detained in the office for a week, and then delivered out to the defendant.

## RE KIRKPATRICK—KIRKPATRICK V. STEVENSON.

*Execution—Statute of Limitations—Interest—Evidence.*

One of two executors and co-residuary legatees got in portions of the residuary estate, and as to such his estate was held liable as for a legacy to the other residuary legatee, 19 Can. L. J. 95. Some of the moneys so got in were re-invested, and afterwards came again into the hands of such co-residuary legatee in administering the estate.

*Held*, as to the latter moneys, the relationship of debtor and creditor applied, but that by reason of the Statute of Limitations the account could not extend further back than six years.

Some of the residuary estate consisted of lands, which the co-residuary legatee as tenant in common occupied, or got in the rent and profits of.

*Held*, (1) that the account extended only to whatever had been paid or given by tenants or occupants of the joint property more than the co-tenants' just share or proportion. (2) That such co-tenant was not liable for the profits or produce taken by him from the common property, nor for his enjoyment of such property when there was no exclusion or ouster. (3) That the six years' bar of the Statute of Limitations applied to such claim.

It is not usual to allow interest on claims where there is no fraud, or wilful withholding of accounts, only a loose mode of dealing between the parties. The discretion under which a jury may allow interest applies to the Master's office.

A claim by the next of kin of a deceased legatee, cannot be adjudicated upon in the absence of a personal representative of such legatee. But where entries had been made in the executor's books giving credit to such next of kin, for portions of such deceased legatee's share, such entries were held to be evidence of the relationship between debtor and creditor between such executor and next of kin, and could be read without entering into the consideration of the origin of the indebtedness.

[May 1, 1883—*The Master in Ordinary.*]

A reference in an administration suit.

The facts appear in the judgment.

*Plumb*, for claimant.

*MacLennan*, Q. C., for executors.

MR. HODGINS, Q. C.—One John Kirkpatrick, who died on the 4th May, 1860, made his will, whereby, after providing for several of his children, he devised to one of his sons, Robert Kirkpatrick, certain lands and a legacy of



\$3,000. He then devised his residuary real and personal estate to two of his sons, John C. Kirkpatrick, (the testator in this action) and the defendant, Richard H. Kirkpatrick, and constituted them and one George M. McMicking, the executors of his will.

Robert Kirkpatrick died intestate in 1861, after the father's estate had been divided ; and his legacy of \$3,000 appears entered to his credit in the books of the estate.

John C. Kirkpatrick who was acting executor of John's (the father's) estate died in 1880, having previously made his will. This action is for the administration of his estate.

Among the claims brought in pursuant to the advertisement for creditors are two filed by the defendant, Richard H. Kirkpatrick, who claims to be a creditor of the estate of the late John C. ; one for his share of the residuary real and personal estate devised to him and John C. by the will of his father ; the other for his share as one of the next of kin of his brother Robert in the legacy of \$3,000, and the proceeds of the lands devised to Robert by his father, which legacy and proceeds the defendant contends came into the hands of his co-executor, the late John C.

Boyd, C., having decided on appeal from the ruling of the former Master (19 Can. L. J. N. S. 95,) that this defendant is entitled to an account of the residuary personal estate of the father (John) come into the hands of his co-executor, John C., within ten years next before the filing of the defendant's claim (9th June, 1881,) the defendant has given evidence of entries made by John C. in the books of the estate of the receipt of moneys on account of such residuary estate, real as well as personal, some of which moneys are credited to the defendant, Richard H., and others are identified by the locality or name of the property or asset. He has also given evidence of entries of re-investments and re-loans, and of the receipts of money from rents, or from sales of the residuary real estate, all of which entries the defendant contends prove his claim for his

share of the residuary real and personal estate coming to him from his late father's estate, and for which the estate of John C. is accountable. The claim is opposed on various grounds; but the chief ground relied upon is the bar of the Statute of Limitations.

The judgment of Boyd, C., gives the defendant the right to claim the proceeds of so much of what may be called the original residuary personal estate of his late father, John, as was received by the late John C., within ten years next before the 9th June, 1881. But the defendant further contends that he is entitled to be allowed other moneys shown by the books.

The books show the receipt by John C. of moneys of the residuary estate to which he and this defendant were jointly entitled. For these moneys the Chancellor has held that John C. became liable to this defendant as for a legacy, and that the ten years limit applies to such. The books also show re-investments by John C. of these and other moneys. These re-investments were apparently made by agreement between the parties, but if not so made, the act of the defendant in now claiming them must be held to be a ratification of the original re-investment. The proceeds of some of these re-investments came again into the hands of John C. for the joint account of himself and this defendant. The will contains no directions for the re-investment of these moneys; and in respect of the share of this defendant, there was, therefore, no duty upon John C. as a trustee for his co-executor or co-owner. His receipt of the moneys re-invested made him the defendant's debtor, and to that relationship the six years bar applies. The defendant will be entitled to his share of these moneys received by John C. within six years of the filing of his claim, that being the date fixed by the order.

The defendant also claims to be allowed his share of the rents and profits received by John C. from the residuary real estate, of which they were both tenants in common. This claim can only be enforced by virtue of the Imperial statute, 4th Anne c. 16, which (s. 27) enables one tenant in common to

bring an action of account against his co-tenant for receiving more than comes to his just share or proportion from the common property. But for the statute there would be no such claim: *McMahon v. Burchell*, 2 Phil. 127; and the claim may be enforced in equity if the action would lie at law: *Henderson v. Eason*, 2 Phil. 308. The action lies against the co-tenant for what he receives—not takes—of money or something else which another pays or gives him more than his just share or proportion: *Henderson v. Eason*, 17 Q. B. 701; and he is not answerable if he takes the whole enjoyment of the property where there is no exclusion or ouster: *Nash v. McKay*, 15 Gr. 247; nor for any profit made thereout by the employment of his industry and capital by tilling and manuring, or by feeding and grazing cattle: *Henderson v. Eason*, 17 Q. B. 701; nor for cutting down trees of a suitable age and growth: *Martin v. Knowllys*, 8 T. R. 145; *Rice v. George*, 20 Gr. 221; nor other acts of waste: *Griffies v. Griffies*, 8 L. T. N. S. 758; nor for cutting and taking away a crop of hay the whole produce of the common property: *Jacobs v. Seward*, L. R. 4 C. P. 328. According to these cases the account extends only to whatever has been paid or given by tenants or occupants of the common property more than the co-tenant's just share or proportion; and such claim is also within the six years bar of the statute: *Reade v. Reade*, 5 Ves. 744.

The defendant further claims to be allowed interest on the moneys which may be found owing to him as a creditor of the late John C. I have already disposed of a question somewhat analogous in *Hutton v. Federal Bank*, 9 P. R. 568, in which I referred to the case of *Boddam v. Riley*, 1 Bro. C. C. 238, which shows that nothing but what arises from a contract, agreement or demand of a debt can give rise to a demand of interest; and that a Court of equity in such cases follows a Court of law. The case of *Turner v. Burkinshaw*, L. R. 2 Ch. App. 488, is to the same effect. In that case the defendant had been plaintiff's agent for a number of years. Though accounts had

been occasionally rendered by the defendant, no settlement had ever taken place between them. In later years errors were discovered, and then on an investigation of the accounts the defendant paid over a small balance of £120, alleging it to be a final settlement. A suit was afterwards instituted, and during its progress the defendant paid £1,400 into Court. A further sum of £2,937 was found to be due by him, which was also paid into Court. The plaintiff claimed interest on the balances in the defendant's hands at the end of each year; but the Master of the Rolls, and afterwards Lord Chancellor Chelmsford, in appeal, held that as there was no charge of fraud, nor a wilful withholding of the accounts, only "a loose mode of dealing between the parties" the defendant was not liable to the penalty of paying interest on the moneys in his hands.

The statute (R. S. O. ch. 50 ss. 267, 268) allowing a jury to add interest in their verdict gives them a discretion, and that discretion applies to the jurisdiction here. In *Hill v. South Staffordshire R. W. Co.* L. R. 18 Eq. 154, Hall, V. C., refused to exercise a discretion in allowing interest, and there are some features in that case similar to some in this. In *Spence v. Hector*, 24 U. C. R. 877, though a jury allowed interest the Court of Queen's Bench struck it out of the verdict. I think a jury would not allow interest in this case.

During the argument I intimated that I thought the claim of the defendant as one of the next of kin of the late Robert Kirkpatrick for an account of the defendant's share in Robert's estate could not be adjudicated upon in the absence of a personal representative of that estate. There is a conflict of authority on this point, but I think the decisions of Lord Romilly, M. R., in *Cary v. Hills*, L. R. 15 Eq. 79, and Sir George Jessel, M. R., in *Rowsell v. Morris*, L. R. 17 Eq. 20, that such a personal representative is necessary, are more likely to be followed than the cases decided the other way by Malins, V. C., in *Rayner v. Koehler*, L. R. 14 Eq. 262; *Coote v. Whittington*, L. R. 16



Eq. 584; *Re Lovett, Ambler v. Lindsay*, L. R. 3 Ch. D. 198, and I now follow them; and hold that the defendant cannot proceed on his claim in this action as one of such next of kin in the absence of a personal representative of Robert's estate. Mr. Plumb for the defendant, asked, in case I should so hold, that he might be allowed time to make an application to the Court for the appointment of an administrator *ad litem* (See R. S. O. ch. 46 s. 51.) I think his application reasonable, and the further consideration of this part of the defendant's claim is reserved.

But a part of the defendant's claim in respect of this share of Robert's estate depends upon entries made in the books of the late John C. by which he assumed to divide the proceeds of Robert's estate amongst the next of kin, and entered various sums to the credit of this defendant. I think the defendant is entitled to prove these entries as showing a different relationship than that of next of kin viz: that of debtor and creditor, between the late John C. and himself. The entries are admissions of an indebtedness, and the defendant may read such admissions without entering into a consideration of the origin of the indebtedness. But to the liability which this relationship of debtor and creditor creates, the Statute of Limitations enables the plaintiff to contend, as he does contend, that the defendant cannot enforce it against the estate—for none of the entries appear to have been made within the six years next before the filing of the defendant's claim. The Statute of Limitations bars the defendant's remedy, and, therefore, the plaintiff's contention must prevail.

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## LUMSDEN v. DAVIS.

*Appeal—Security for costs.*

An application for further security for costs of appeal, on the ground of the insolvency of one or more of the sureties, should be made to the Court appealed from.

[June 8, 1883.—*Burton, J. A.*]

THIS was an appeal by the defendant, from a judgment of the Queen's Bench Division, pronounced on the 24th of June, 1882, and the usual bond for securing the debt and costs of the appeal had been given and perfected. Since that time the appellant, and one of the persons joining in the bond as surety, had become insolvent and had effected a compromise with their creditors.

A motion was now made before *Burton, J. A.*, to dismiss the appeal, unless further and better security should be furnished; and affidavits were filed stating these facts, and that the appellant and such surety had not any surplus estate after payment of the amount of the composition agreed upon with their creditors.

*Teetzel*, in support of the application, cited *Saunders v. Furnivall*, 2 Chy. Ch. R. 159.

After looking into the authorities,

BURTON, J. A.—In the above case, the only one I can find on this subject, the application was made to the Court appealed from. I think it better to follow that case, and if the order then to be made is not complied with, a motion might be made to stay proceedings on the appeal, or to strike it out.

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## SYNOD V. DEBLAQUIERE.

*Petition to open publication—Single Judge—Material evidence.*

A petition by the plaintiffs for leave to produce newly discovered evidence, and to re-open the case for its admission after the judgment of the Court of Chancery in favour of the defendants had been affirmed by the Court of Appeal and the Supreme Court of Canada, was brought on for hearing before Proudfoot, J., in Court.

*Held*, that as the application might, before the O. J. A., have been made to a single Judge, and as there is no provision in that Act specially applicable to the subject, the original practice of the Court remains, and the application was properly made to a single Judge.

*Held*, that upon the discovery of material evidence publication may be opened even after judgment affirmed by the two Courts above.

The learned Judge here considered that what was proposed to be introduced as new evidence was not material, and dismissed the petition, with costs.

[June 27, 1883.—*Proudfoot, J.*]

THIS was a petition by the plaintiffs for leave to produce newly discovered evidence, and to reopen the case for its admission, after the judgment of the Court of Chancery in favour of the defendants had been affirmed by the Court of Appeal and the Supreme Court of Canada.

The facts appear in the judgment.

*S. H. Blake*, Q. C., *Moss*, Q. C., and *Walter Barwick*, for the petitioners.

*McCarthy*, Q. C., *Alfred Hoskin*, Q. C., and *Arnoldi*, for the respondents.

The following cases were referred to. *Flower v. Lloyd*, 6 Chy. D. 297, *S. C.* 10 Chy. D. 327; *Fabrilius v. Cook*, 3 Burr. 1772; *Walcott v. Stolicker et al.* 16 C. P. 555; *Waters v. Shade*, 2 Gr. 218; *McKay v. McKay*, 6 Gr. 279; *Waterhouse v. Lee*, 10 Gr. 176; *Colonial Trusts v. Cameron*, 21 Gr. 70; *Brooke v. Lord Mostyn*, 2 DeG. J. & S. 373, *S. C.*, L. R. 4 H. L. 304; *In re St. Nazaire Company*, 12 Ch. D. 88.

PROUDFOOT, J.—The plaintiffs apply by petition for leave to produce newly discovered evidence, and to reopen the case for its admission.

A preliminary objection was taken that an application

of this nature must be made to the Divisional Court. Previous to the Judicature Act an application to open publication upon the discovery of new evidence was properly made to a single Judge. There is no provision in that Act specifically applicable to the subject, and therefore the original practice of the Court remains. The case cited *In re St. Nazaire Company*, 12 Ch. D. 88, was one where no new evidence was sought to be introduced, and therefore does not govern this. But whatever may be the practice, I will assume that I have jurisdiction.

In opposition to the petition it was contended that judgment having been given, and carried to the Court of Appeal and to the Supreme Court and affirmed by both, that the discovery of new evidence, even though material and though establishing that the defendants ought not to have succeeded, could not be admitted. But I think this is altogether too rigid a rule, and not in conformity with the practice of the Court. The case of *Marriott v. Hampton*, 7 T. R. 269, is not very clear as to the length to which the action had proceeded; but from the mention of a cognovit having been given, I assume that the money was not actually levied upon legal process, but was paid voluntarily; and in such a case there would be no right to ask for a revision of the proceedings. In the present case the money has not been paid over, but is still *in medio*. But in this Court it has always been the practice to open publication for the admission of newly discovered material evidence, even after a decree has been affirmed in the highest Court of Appeal, in Parliament; and bills of review for that purpose, for which petitions are now substituted, are recognized subjects of equity pleading.

In the present instance, on the hearing of an appeal from the Master before me, a copy of a memorandum said to have been attached to the foot of an account, was used in evidence, purporting to have been signed by J. H. Cameron. The original was not forthcoming. Evidence of searches for it was given sufficient to admit of secondary evidence. The copy was signed by Cameron, but wit-

nesses gave evidence to shew that in the original paper Cameron had added to his signature some phrase or title, such as "Manager," or "Manager of the Clergy Trust Fund," shewing that he was acting as agent of the plaintiffs. It was a material fact to prove that in signing that paper he was acting on behalf of the plaintiffs. In disposing of the case, I thought it not material whether Cameron had added anything to his signature or not; the internal evidence in the memorandum sufficing to shew that he must, in signing the paper, have done so as the plaintiffs' agent. There was, no doubt, some discussion upon the effect of the evidence, whether it should be deemed to prove the addition of something to the signature, and I thought it did. But my judgment was altogether irrespective of that, and I so expressed it. In the appellate Courts nothing seems to have turned upon the form of the signature.

The original account with the memorandum subscribed has now been found, and it is ascertained that Cameron signed his name simply, without any such description of the character in which he signed it as the witnesses thought he had added to it.

In giving leave to open a case upon the discovery of new evidence, an essential ingredient is that the evidence be not only newly discovered, and that it could not with reasonable diligence have been obtained earlier, but that it should be *material*. The perusal of the original account and memorandum confirms the impression I had derived from the copy of the memorandum alone, that the account was a statement of the account of the plaintiffs with the defendant Deedes, and appearing to account for a sum of £15,000 of sterling debentures of the town of St. Catharines, which the plaintiffs were to advance from time to time to Deedes on mortgages being assigned to them. The items of the account seem to me to shew this, and they account for all but about £3,000 stg. The memorandum then states: "There still remain £3,000," of which Cameron says £1,000 were paid to the Bank of Upper

Canada, and £2,000 were retained on account of the Ross trust ; this being a mortgage which the plaintiffs undertook to pay. It seems to me as clear as anything not susceptible of mathematical demonstration can well be, that, in preparing this account and writing the memorandum, Cameron was acting in the capacity of manager of the clergy trust fund, an office that he in fact occupied. So that whether he added to his signature "manager" or not was quite immaterial.

That being so, what is proposed to be introduced as new evidence is not material, and ought not to be allowed to be given.

The argument for the plaintiffs ranged over a good deal of the evidence previously given ; but in that respect it was an endeavour to shew that the judgment was erroneous even upon the evidence before the Court. That would be rehearing the cause and clearly beyond my power, and as clearly beyond the power of the Divisional Court, to entertain.

The petition is dismissed, with costs.

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## LEWIS V. THE TALBOT-ST. GRAVEL ROAD CO. AND OTHERS.

*Report—Execution—Appeal—Mistake.*

A decree directed a reference to a Local Master to ascertain such sums as would be sufficient to satisfy the damages complained of, awarded costs and directed payment to be made forthwith after the making of the report.

*Held*, that the report did not require confirmation, and therefore that executions issued under it by the plaintiff were valid; but pending an appeal from the report the executions were stayed in the sheriff's hands.

The solicitor for the defendants (except Lewis) had given due notices of appeal, but through inadvertence *set down* the appeal on behalf of the defendants the gravel road company only.

Under the circumstances stated in the judgment, the other defendants were allowed to set down their appeal.

[August 4, 1882.—*Osler, J.*]

THE decree, dated 20th September, 1881, declares that the plaintiff is entitled to specific performance by the Gravel Road Company of an agreement for a lease for two years from 21st June, 1880, of the tolls on their road, and to compensation for the loss of tolls, &c., and also to damages for an assault and other wrongs inflicted upon her by the defendants Dickson and McGregor in ejecting her from one of the toll houses on the road. A reference is directed to the Master at London to ascertain the sums sufficient to be paid for such compensation and damages by the defendants respectively, and it is ordered that these sums shall be paid by them forthwith after the Master shall have made his report. The decree also directs payment by the defendants other than the defendant Lewis of the plaintiff's costs of suit, and by the defendants the Gravel Road Company of the costs of the defendant Lewis, who is the husband of the plaintiff, and is made a party also in respect of a claim against the Gravel Road Company arising out of the agreement for a trifling sum, apparently within the jurisdiction of the Division Court. The Master made his report on the 18th May, 1882, and thereby found that a sufficient sum to be paid to the

plaintiff by the Gravel Road Company for compensation for loss of tolls and other losses and damages was \$5302.45, and that a proper sum to be paid by Dickson and McGregor for the wrongs mentioned in the bill of complaint was \$300. He taxed the plaintiff's costs of suit at \$1345.92, and the defendant Lewis's costs of suit at \$91.39, the former being a trifle more than one fourth of the amount awarded, and the latter very nearly half of the amount claimed.

The report was duly filed, and on the 2nd June notices of appeal therefrom were duly served on behalf of the defendants other than Lewis, the ground of appeal being that the sums awarded for compensation and damages were excessive.

According to the practice in this Division of the High Court, as stated to me, these appeals were of such a nature that although regularly given for the 12th June they could not have been heard before the long vacation, and would therefore in any event have stood over until September. By some slip or oversight on the part of the solicitor, the *præcipe* to set down the appeals, referred to that of the Gravel Road Company only, omitting the names of the other defendants.

On the 22nd June writs of *fi. fa.* goods and lands were issued and delivered to the sheriff against the defendants Dickson and McGregor to levy the damages and costs, and on the 30th similar writs were issued against the Gravel Road Company for the damages awarded against them and the same costs, and a writ was also issued by the defendant Lewis for his costs against all his co-defendants.

These defendants now move to set aside the executions on the ground (1) That the Master's Report had not been confirmed or become absolute, an appeal having been taken therefrom before the expiration of fourteen days from the filing thereof. (2) As to the execution of Lewis, it was irregular in being issued against defendants Dickson and McGregor, the other defendants only having been ordered to pay his costs.

In the alternative, all the defendants asked that proceedings might be stayed until the hearing of the appeals, and the defendants D. & M. that their appeal might now be set down notwithstanding the omission to do so at the proper time.

It appeared that the defendants had moved to rehear the principal decree, and that the case had by Judge's order been struck out of the list of causes set down for rehearing, and that an appeal was pending against that order.

I think the plaintiff's proceedings are regular, as the Report was not one which required confirmation. The decree directed that payment should be made forthwith after the Master had made his Report. In Bennett's "Master's Office," p. 23, it is said that some reports require confirmation, others do not, "and the distinction appears to be that where there is any further order to be made by the Court on the Report it is necessary to confirm it, but where it is positive, and process may be taken out to enforce performance of the matter reported, it is only necessary to file it, unless the adverse party do, in due time, obtain some order of Court to control or suspend the same." The practice is stated in much the same way in the 6th ed. of Mr. Smith's book on Chancery Practice, p. 621, where the case of *Empringham v. Short*, 11 Sim. 78, is cited as authority for it, and in Messrs. Snelling & Jones's work on the Chancery Acts and Orders I find a reference on this particular question to the case of *Re Yaggie* reported in 7 U. C., L. J., 293, 1 Chy. Ch. R. 52, a decision of the present Chief Justice of Ontario, then Vice Chancellor, which is on all fours with the present case, and shews conclusively that this report is not one which requires confirmation before it can be acted on.

Then, should the proceedings be stayed as regards the defendants the Gravel Road Company, whose proceedings are regular? I think they should. They gave notice of appeal promptly, the amount ordered to be paid by them is very large, and there is an appeal pending from the order which deprived them of their right to rehear the

principal decree. The executions, however, need not be set aside. They may remain in the sheriff's hands as a security. It is said they have no property except their road. If so, nothing can be done under the executions for a time long enough to enable the appeals to be heard, and while the writs will prevent any disposition being made of the road to the injury of the plaintiff, the necessary delay cannot affect her.

The defendants Dickson and McGregor are in a slightly different position. They are in default, having omitted to set down their appeal, and I have not the evidence before me which was taken in the Master's Office, and so am not able to say whether an excessive sum has been awarded for damages. Yet their case is in some respects novel as regards the assessment in this Division of the High Court of damages for wrongs of the nature complained of, and there is the fact that another appeal is pending, the result of which may be to modify or reverse the decree under which these very damages are now sought to be enforced. It is also a fact that notice of this appeal was regularly given, so that I have evidence of their *bona fide* intention to appeal at that time, and I have the affidavit of the solicitor that it was by an oversight their names were not added to the *praecipe* by which the appeal was set down. Cases are to be found in which parties who tripped were pinned to the spot with the utmost severity, and found no place for repentance, and I am asked to act upon them here. But others are also to be found which lay down a less stringent rule. Where nothing is done within an allowed delay an appeal for relief out of time, which may deprive a successful party of the fruits of his judgment, is to be narrowly scrutinized and hardly granted. But I look with other eyes upon a motion like this, where proceedings were being regularly taken and failed from mere slip in their course. I adopt the language of the learned Master in Chambers in *Siewwright v. Leys*, 9 P. R. at p. 201, as expressing my own views as to the principle on which discretion should be exercised in such a case.

Under all the circumstances, and considering that the plaintiff will not be delayed longer than she would have been had the appeal been regularly set down, I think the defendants D. & M. should now be allowed to set down their appeal against the Report, and that proceedings in the execution against them (which need not be set aside) should be stayed on their giving security either to the satisfaction of the sheriff or of the local registrar, for the due forthcoming of the goods seized by the former or their approved value in the event of the dismissal of the appeal, the whole without prejudice to the appeal now pending against the order striking out the cause from the list of causes set down for rehearing.

The *fi. fa.* issued by the defendant Lewis is irregular, and must be amended by striking out the names of the defendants D. and M.

As to costs, the defendant Lewis and the plaintiff being represented by the same solicitor in the cause, and on this motion, there will be no costs to either party, each having partially succeeded.

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## KYLE ET AL. V. BARNES.

*Absconding Debtors Act, R. S. O., ch. 68.*

Goods were sold to the defendant by the plaintiffs upon a five months' credit, and he refused to accept a bill of exchange at five months for their price. The plaintiffs, before the expiration of the five months, issued a writ of attachment against the defendant under the Absconding Debtors Act, R. S. O. ch. 68, on an affidavit that defendant was indebted to them for goods sold and delivered.

*Held*, that to bring a case within the statute, there must be a debt due and payable at the time of the issuing of the writ, and that in this case there was no such debt as sworn to. The attachment was therefore set aside.

*Semble*, that in proceedings of this kind the existence of the debt itself may be enquired into.

[June 21, 1883.—*The Master in Chambers.*]

[August 28, 1883.—*Cameron, J.*]

THIS was an application by defendant, on notice of motion, to set aside an order made by the Judge of the County Court of the county of Waterloo, on the 11th May, 1883, directing the issue of a writ of attachment against the defendant, as an absconding debtor, and to set aside the said writ and all subsequent proceedings in the action, on the grounds: 1. That the defendant was not an absconding debtor within the meaning of the statute at the time of the issuing of the writ of attachment. 2. That the debt for which the said writ was issued was not due and payable at the time the writ was issued.

The writ of attachment was obtained on an affidavit made by Colin Munro, one of the plaintiffs, in which he swore that the defendant was justly and truly indebted to the plaintiffs in the sum of \$346.88, for goods sold and delivered by the plaintiffs to the defendant on or about the 11th day of April, 1883. The affidavit further stated that at the time the goods were shipped to the defendant a draft was forwarded for acceptance by him to cover the price of the said goods, and the same was returned to the plaintiffs by their bankers, with the information that the defendant was away from home.

The defendant made and filed an affidavit, sworn on the 28th day of May, in which he swore that at the time of

the issuing of the writ of attachment he was not justly and truly indebted to the plaintiffs in the sum of \$346.88, as stated in the affidavit of Colin Munro, the goods for the price of which this action was brought having been sold to him on five months credit, on or about the 11th day of April, 1883, it being positively agreed between him and the plaintiffs' traveller that he should have five months time, and nothing was said as to a draft or bill of exchange, nor did he agree to accept any draft or bill of exchange, and he did not know why the plaintiffs drew on him as stated in the said affidavit of Colin Munro.

In reply to this affidavit was filed the affidavit of Frederick Judson, the plaintiffs' traveller, who made the sale of the goods to defendant, in which he stated: "that the defendant is justly and truly indebted to the plaintiffs in the sum of \$346.88, for goods sold and delivered by the plaintiffs to the defendant. It was agreed between plaintiffs and defendant that the defendant should accept a draft at five months to be drawn on the defendant by the plaintiffs. In pursuance of the said agreement the plaintiffs drew upon the defendant for the price of said goods at five months, but the defendant did not accept the draft, and the same was returned protested for non-acceptance."

The invoice of the goods sent to defendant stated the terms thus: "Terms, five months."

*Aylesworth*, for the defendant.

*J. H. Macdonald*, for the plaintiffs.

THE MASTER IN CHAMBERS.—I think no one can read the papers in this case, without coming to the conclusion that the defendant is an absconding debtor.

But it is denied that the defendant is indebted, or rather it is contended that the debt is not payable. The goods, defendant says, were sold on a five months credit, and he produces a good deal of evidence to prove it. I think it is proved. The traveller who sold the goods swears that

defendant agreed to accept a bill for them at five months. Such a bill was drawn and protested for non-acceptance. The defendant, on the other hand, shews by his own affidavit and the affidavits of two other persons that there was no agreement to accept a bill—simply a sale of the goods at five months credit. The invoice says nothing of it, if that be important. Here is a question of fact on which the affidavits are opposed.

Then it is urged that in law a cause of action for not accepting the bill, though that bill was for the price of goods sold, would not be within the Act. I do not feel sure that at this day so technical a meaning would be given the word “indebted,” as to exclude a cause of action for non-acceptance of a bill for the price of goods sold. It is so very like a debt. *Clock v. Alfield*, 5 O. S. 504, would seem to be a decision against the plaintiffs on this point.

But however this may be as to the fact or law, it seems plain upon a view of this whole case—the embarrassed state of the defendant’s affairs at the time, and his leaving so shortly after the delivery of the goods—a jury might well find that the purchase by the defendant on credit was a fraud upon the plaintiffs, and the plaintiffs by consequence waiving the wrong may be held entitled to sue in this action for goods sold. I cannot but think this a possible and even probable result, and it is proper, therefore, that the action should go on to trial, and I must dismiss this motion—costs to the plaintiffs in the cause.

The defendant appealed, and the appeal was argued by the same counsel.

CAMERON, J.—It is clear from the facts presented by both parties that at the time the writ of attachment was issued there was not a debt due and payable from the defendant to the plaintiffs for \$346.88, or any other sum, unless the failure to accept the plaintiffs’ draft, assuming it was part of the agreement and consideration for sale that defendant would accept such draft, gave an immediate right of action for goods sold and delivered.

I thought the law was clearly otherwise, and that the plaintiffs' remedy in such a case was by action for damages for breach of the special agreement to give the note or bill, and the authorities seem to be clear to this effect: *Mussen v. Price et al.*, 4 East 147; *Dutton v. Solomonson*, 3 B. & P. 582; *Hoskins v. Duperoy*, 9 East 498, and in our own Court of Queen's Bench, *Wakefield v. Gorrie*, 5 U. C. R. 159; *Silliman v. McLean*, 13 U. C. R. 544. There was no debt such as that set forth in the plaintiffs' affidavit, and the attachment must be set aside. It is not necessary to decide whether, under the Absconding Debtor's Act, R. S. O. ch. 68, an attachment may or may not be issued on a claim for damages for breach of such a contract as that described in the present case.

The facts shew there is not the cause of action which the plaintiffs really have, assuming it was part of the agreement to pay by bill or note, disclosed by the affidavit on which the Judge's order was made, and there was an improper concealment of the true arrangement between the parties from the learned Judge on the application to him. No one could gather from the affidavit of Munro that a credit of five months had been agreed upon. That fact would appear to have been studiously kept out view, the implication from what is stated rather being, when coupled with the declaration of present indebtedness, that the draft would be accepted and paid at once. Had the true facts been presented to the Judge he might not have granted the attachment at all.

I have some doubt as to whether on this application the existence of a debt sworn to can be questioned or enquired into. It would seem to be the opinion of the present Chief Justice of the Common Pleas Division that it may, as in *Jackson v. Randall*, 6 P. R. at page 168, he says: "It has been decided that the question of *residence* may be tried on application like the present; and I presume also, as of course, the fact of *departure*; and if so, it appears to me to follow that the *intent* may be tried also. Logically, the fact of the debt should be liable too, and

in a plain case it may be, as it was even under the old law and cases applicable to arrest."

This is a plain case. The plaintiffs themselves shew they have no debt that was payable at the time the writ was issued, and I think the statute does not warrant the issue of an attachment where the debt or indebtedness is not presently payable, though there may be a present indebtedness without any right in the creditor to present payment. The attachment must contain a summons to the defendant, and is the commencement of the suit, shewing that the Legislature did not contemplate a resort to such proceeding where the debt was not due and payable.

The writ of attachment must be set aside, and the goods seized by the sheriff restored to the defendant. The summons may stand, and the plaintiffs may have leave to amend their statement of claim as filed, if they so desire it. They must pay the cost of the proceedings before the Master in Chambers, and of this appeal. Apart from the question of indebtedness, the material before the learned County Court Judge would fully justify the issuing of an attachment, and nothing has since appeared to justify my interference with the order made by him on the ground that the defendant had not absconded from the Province. My decision rests entirely on the ground that there was not a debt due and payable from the defendant to the plaintiffs of the nature sworn to when the attachment was granted.

I have observed that the same person has made more than one affidavit where the matter deposed to might have been embraced in one affidavit, and the Master in taxing costs ought not to allow for any such affidavit that he may deem unnecessary. If in making these affidavits the intention was to increase the costs, it was very improper, and would be conduct on the part of the professional gentlemen that is exceedingly reprehensible, but no doubt it is open to explanation, and no blame may be attachable to any one in this instance (a).

(a) Affirmed on appeal by the Divisional Court, Common Pleas Division, Hilary Sittings, 1884.



## HUYCK V. PROCTOR.

*Judgment against executors—Form of plea.*

To an action on two promissory notes against the executors of the maker they pleaded—

1. That they never were executors,

2. *Plene administravit.*

The plaintiff obtained a verdict, and judgment was entered for the debt and costs to be levied of the goods of the testator in the hands of the defendants, his executors, if they had so much thereof, and if not, then to be levied of the proper goods and chattels of the defendants.

A motion to amend the judgment by relieving the defendants from personal liability was refused with costs, for as they had denied their representative character, the plaintiffs were entitled to such judgment.

[September 3, 1883.—*The Master in Chambers.*]

THE plaintiff sued upon two promissory notes made by the defendants' testator.

This was a motion to amend the judgment and writs of execution issued pursuant thereto.

The facts appear in the judgment.

*Aylesworth*, for the defendants.

*Watson*, for the plaintiff.

THE MASTER IN CHAMBERS.—The only question in this case is one under the old Common Law Practice, viz., whether the verdict on the record as framed warrants the judgment which the plaintiff has entered against the defendants, charging them, on failure of the assets of the estate, for the whole debt and costs *de bonis propriis*—for the motion is simply to amend that judgment, and the greater part of the material produced before me is useless upon this application, except as furnishing what perhaps it does furnish, a reason for the lateness of this application on the part of the defendants.

The plaintiff sues upon two promissory notes made by the defendants' testator. To this the defendants plead, 1st. That they never were executors; and, 2nd. *plene administravit*. Issue was joined, and upon the trial in

1880, a verdict was found for the plaintiff for \$703.77. Upon this a judgment for the plaintiff was entered in August, 1880, for the debt and costs, to be levied of the goods of the testator in the hands of the executors if they have so much thereof, and if not, then to be levied of the proper goods and chattels of the defendants.

I have always understood the law to be, that where the defendant pleaded a denial of his representative character, and it was found against him, that the plaintiff was entitled to such a judgment as is entered here, for the amount of the recovery in the action and the costs. It is so laid down in Arch. Prac. 13th Ed. 1008; 1 Wms. Saund. note 10 to *Hancocke v. Prowd*, p. 336, which refers to the old authorities, and that statement of the law has been repeated in many treatises since then, and in reported cases since then that law has been recognized. Indeed, the note in Wms. Saund. is usually the authority referred to for the proposition. I am not aware of any thing which alters the law so stated, which I think has always been the understanding of the profession. I must, therefore, refuse the motion, because the record and verdict, it seems to me, do entitle the plaintiff to the judgment as entered.

But I see from the papers that the costs have been paid by the defendants, and also one of the notes sued on. I do not know what the sheriff is directed to levy on the *fi. fa.*, and if necessary this must be seen to, that the levy may be confined to the proper amount.

As I have said, this motion is simply to amend the judgment and writs, to make them conformable to what the defendants contend is the legal effect of the verdict. The after proceedings can have no effect on this motion.

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RE WEST MIDDLESEX ELECTION PETITION.  
WALKER v. ROSS.*Election—Trial—Extending time—38 Vic. ch. 10, D.*

An order may be made extending the time for the trial of an election petition under 38 Vic. ch. 10, sec. 2, D., notwithstanding that six months have elapsed since the presentation of the petition, and though the application for such extension is not made within the six months.

*Semble*, if the trial be not commenced within the six months the respondent should move to dismiss the petition.

[September 11, 1883.—ARMOUR, J.]

THIS was an application to extend the time for the trial of an election petition.

*H. J. Scott*, Q. C., for the petitioner.

*Bethune*, Q. C., contra.

The facts appear in the judgment.

ARMOUR, J.—On the 5th day of September, 1883, Scott, Q. C., obtained from Cameron, J., on behalf of the petitioner, a summons calling upon the defendant to shew cause before me on the 8th day of September, 1883, why an order should not be made extending the time for the trial of this petition, and why the day of the trial of the same should not be appointed. This summons was granted upon the affidavit of the petitioner's solicitor that, "no application was made within six months from the date of the filing of the said petition to have a day fixed for the trial thereof, because of the decisions of the Courts in this Province, that petitions under the Dominion Controverted Election Act, styled as the petition herein was styled, namely, in the Queen's Bench Division of the High Court of Justice, were invalid because styled in a Court having no jurisdiction, and because I believed that the same objection would apply to an application to extend the time for the trial thereof."

To this summons Bethune, Q. C., shewed cause, relying on the *Addington Election*, 39 U. C. R. 131, and on the *Kingston Election*, 39 U. C. R. 159.

It was conceded, on all hands, that six months had elapsed from the filing of this petition before this application was made.

The provision of 38 Vic. Ch 10, sec. 2, D., that "the trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with *de die in diem* until the trial is over, unless on application, supported by affidavit, it be shewn that the requirements of justice render it necessary that a postponement of the case should take place," seems to me to be directory only. What the Legislature was aiming at was expedition in the trial of petitions, and the prevention of collusive delay, and it directed therefore that the trial should be commenced within six months, but it did not provide what would happen in case the trial was not commenced within six months. The most that could happen would, in my opinion, be, that the respondent could make an application to the Court to have the petition dismissed on that ground, which application could be met by a sufficient cause; and in case no such application were made, the petitioner could proceed to the trial of the petition notwithstanding the expiry of the six months, and I do not think that his doing so would be a nullity. I think it, however, quite clear that I have a discretion and a power to extend the time for the proceeding to the trial of the petition, although the six months expired before I was applied to, and I think I ought so to extend it. If application had been made to extend the time before the six months elapsed, it would have certainly been extended, as many others were awaiting the judgment of the Supreme Court, and if that was a sufficient reason for extension of time before the expiry of the six months, I think it equally sufficient after it.

The time will therefore be extended for six months from this date, and I will appoint Tuesday, 23rd October, at 10 a. m., at the town hall, at Strathroy, as the time and place for trying the petition herein, costs to be costs in the cause.

## TORRANCE ET AL. V. LIVINGSTONE.

*Counter-claim—Third parties.*

In an action by the plaintiffs as endorsees of a bill of exchange, the defendant (the acceptor) set up that the bill was part of the price of goods bought by them from H. & G., the drawers, and filed a counter-claim against the plaintiffs, and H. & G. as defendants by counter-claim, claiming that the bill was transferred to the plaintiffs after maturity, with full notice and knowledge of the facts, and claiming \$10,000 damages from H. & G. for breach of contract in respect of the goods, and asking for the delivery up and cancellation of the bill, and other bills in the same transaction.

Upon the application of H. & G. the Master in Chambers struck out the counter-claim, and the names of H. & G. as defendants.

*Semble*, that as against the plaintiffs, the defence should have been pleaded as a defence to the claim on the bill.

[September 15, 1883.—*The Master in Chambers.*]

AN action by the plaintiffs as endorsees of a bill of exchange accepted by the defendant.

The defendant set up that the bill was part of the price of goods bought by him from Henderson & Glass the drawers, and the defendant filed a counter-claim against the plaintiffs, and against H. & G., as defendants by counter-claim, claiming that the bill was transferred to the plaintiffs after maturity, with full notice and knowledge of the facts between the defendant and H. & G., and claiming from H. & G. \$10,000 damages for breach of contract in respect of the said goods, and from the plaintiffs and H. & G. the delivery up for cancellation of the bill sued on and other bills in the same transaction.

This was an application by Henderson & Glass to strike out the counter-claim as against them, and also to strike out their names as defendants by counter-claim.

*Worrell*, for the defendants by counter-claim.

*Aylesworth*, for the defendant.

THE MASTER IN CHAMBERS.—The added defendants reside in England, and one part of the motion is to strike out the counter-claim, because Henderson and Glass are not resident within the jurisdiction of the Court, and the



cause of action in the counter-claim is not within Rule 45, O. J. A., so that these defendants contend that they could not be sued in Ontario for the matters of the counter-claim.

As far as the facts are shown to me it appears that that cause of action did arise in England. That may be varied by facts to be shown, of course, and Mr. Aylesworth would undertake to prove a cause in the counter-claim coming within Rule 45. My opinion is, that a counter-claim such as the present (I do not now speak of set-off strictly,) can only be alleged against a foreign defendant where he could be sued here for that cause in an original action, under Rule 45. This becomes unimportant in the decision on this motion, for a reason that will appear further on.

Then Mr. Aylesworth objects that this motion cannot be entertained because the service on Henderson & Glass has been allowed, by order. To me it seems not to affect this question at all. That order has force to show that the service is all right; that is, to bring the parties into Court, but it is not a declaration that the parties are proper parties to be added in this action, and it does not take away from Henderson & Glass the right to move against the original defendant's act in bringing them in. That order for allowance was according to the practice *ex parte* I think this very plain. No such extensive scope can be attributed to that order for allowance.

The plaintiffs sue as endorsees of a bill of exchange accepted by defendant. The defendant Livingstone shows that that bill was part of the price of goods bought by him from Henderson and Glass, the drawers, and he shows very serious breaches of contract by Henderson & Glass in respect of these goods, amounting in effect to more than an utter deprivation of value: that Henderson & Glass transferred the bill to the plaintiffs with the fraudulent design of placing the same in the hands of a third person: and that the plaintiffs gave no consideration for the bill, and are suing on it merely as trustees for Henderson & Glass: that the bill was transferred to the plaintiffs since

it became due, and with full notice and knowledge by the plaintiffs of all the facts set forth in the defendant's counter-claim, and the other equities attaching to the bill. And upon all this defendant claims \$10,000 damages from Henderson & Glass: that the bill sued on, and the other bills given on the same transaction of purchase, may be delivered up to be cancelled; and some other things are sought against Henderson & Glass.

The only relief sought against the plaintiffs, is, that the bill sued on be delivered up to be cancelled, on the grounds set forth in the defendant's pleadings.

Upon this it appears to me that Henderson & Glass are not proper parties to be brought in as defendants in this suit.

Very similar cases have occurred before. One is *Canadian Securities Co. v. Prentice*, 9 P. R. 324, which I may cite, though originally a decision of my own, because it went to appeal and was affirmed. As far as an expression of my opinion is concerned, I refer to the language that I used there.

The defendant shows a complete defence to the plaintiffs' action, without bringing in Henderson & Glass at all, but he wishes to go farther, and in the plaintiff's action to try causes of action between himself and Henderson & Glass with which the plaintiffs have nothing whatever to do. To this both the plaintiffs and Henderson & Glass have a right to object, and Henderson & Glass do object by this motion. No doubt if Henderson & Glass were suing, the matter of the present counter-claim would be a good counter-claim against them. But in what view does the conduct of Henderson & Glass afford a defence to the defendant against the plaintiffs. It is a defence under the general law of negotiable instruments. The defendant first shows a defence as against Henderson & Glass, and affects the plaintiffs with it by showing that they took without value and are suing as trustees of Henderson and Glass. That is a complete defence to the note.

I am of opinion that the proper pleading by the original

defendant against the plaintiffs is not by way of counter-claim at all; but suppose that defendant may counter-claim against the plaintiffs for the only item of relief that he seeks against them—that is, that the bill sued on may be delivered up to be cancelled—that is a counter-claim which he might prefer against the plaintiffs without joining Henderson & Glass. Therefore it cannot afford a reason for joining them. The case of *Macdonald v. Bode*, W. N. 1876, p. 23, is against all the later authorities, and the whole course of reasoning contained in them.

I must refer particularly to the case in 9 P. R. 324, which is almost precisely on all fours with this. There are several of the later English cases there cited, and Mr. Justice Cameron's judgment fully supports my present decision, though it may not authorize all the opinions I have expressed.

I strike out the counter-claim against Henderson & Glass, and indeed I strike out their names as defendants in this action.

The pleading may remain as against the plaintiffs for all the relief claimed against them, in the form of counter-claim if the defendant wishes it; though indeed I think it would be much more properly pleaded as a defence to the claim on the bill simply. Perhaps it is of little practical importance which way it is. The last paragraph of the judgment of Cleasby, Baron, in *Young v. Kitchen*, L. R. 3 Ex. Div. 131, is very expressive of the true view of this pleading.

The costs will be costs to the defendants Henderson & Glass, payable forthwith, as they are struck out of the record.

Since this motion, the defendant has been examined and swears, as I understand the examination, that the bill sued on was not given for the consideration stated in the counter-claim at all, but for other iron purchased from Henderson & Glass which was quite satisfactory. It was objected that the examination was not put in; and it was

not upon the motion ; but the defendant seems to have sworn to the fact as stated, and it alters the complexion of the case very much (a).

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RE CRAIG.

*Vendor and purchaser—Specific performance—R. S. O. ch. 109.*

If under R. S. O. ch. 109, the Court adjudicates upon a question of title between vendor and purchaser, and directs the purchaser to carry out his contract, and the purchaser then fails to carry out the contract, it is unnecessary to bring an action for specific performance of the contract ; the requisite relief may be had on notice of motion for payment of the purchase money, or in default a resale, &c.

[September 17, 1883.—*Ferguson, J.*]

AN order made upon an application under the Vendors and Purchasers Act, R. S. O. ch. 109, on the 21st May, 1883, besides dealing with the title to the land in question, contained a clause directing the purchaser to carry out his contract to purchase, forthwith.

The purchaser failed to carry out his contract.

On the 17th September, 1883, *A. C. Galt*,<sup>s</sup> for the vendor, moved on notice for an order directing the purchaser to pay his purchase money into Court, and in default of his so doing within a period to be limited by the order, for leave to resell the property, &c.

FERGUSON, J., doubted whether an order for the resale, which in fact amounted to a decree for specific performance, could be made under the Act.

*A. C. Galt* cited the case of *Thompson v. Ringer*, 44 L. T. 507, where a bill, filed by a purchaser, for specific performance, under circumstances similar to the above, was

(a) The decision of the Master was affirmed on appeal by the Divisional Court, Common Pleas Division, on the 7th March, 1884.

dismissed, on the ground that the parties having once applied to the Court, under the Act, 37 & 38 Vic. ch. 78 (Impl.), all questions thereafter arising between them should be brought before the same tribunal on affidavit, without necessitating the expense of an action.

No cause was shewn for the purchaser.

FERGUSON, J.—Made an order directing the purchaser to carry out his contract in obedience to the former order within two weeks; and, in default, for the vendor to be at liberty to resell, the purchaser to pay the costs of this motion, all costs of the resale, and any deficiency.

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### WILBY V. STANDARD FIRE INSURANCE COMPANY.

*Appeal--Notice--Extending time--Sec. 38 O. J. A.*

A plaintiff was advised by his solicitor on the 3rd of July of the judgment of the Court given on the 30th of June. He did not see his solicitor again until the 20th of August, when he, for the first time, learned that he should have caused notice of appeal to be served within a month from the rendering of the judgment. (Sec. 38 O.J.A.)

*Held*, not a sufficient ground for giving leave to appeal, and thus denying to the party who had obtained the judgment of the Court the right to have it enforced as promptly as the rules and practice of the Court will permit.

*Held*, also, that the fact that the plaintiff might be prejudiced in another action against another party in another division of the High Court, of Justice, by this judgment, was not a ground for granting the indulgence sought.

[September 17, 1883.—Cameron, J.]

THE plaintiff applied for leave to appeal from the judgment of the Queen's Bench Division given on the 30th June, 1883, discharging his order *nisi* to set aside the verdict entered at the trial on the finding of the jury. See 3 O. R. 115.



*B. B. Osler, Q. C., for the plaintiff.*

*W. N. Miller, for the defendant.*

The facts appear in the judgment.

CAMERON, J.—The application is made under section 38 of the Ontario Judicature Act, 1881, which enacts: “No appeal to the Court of Appeal shall be allowed, unless notice thereof is given in writing to the opposite party and to the Clerk of the Crown and Pleas, or Registrar of the proper Court within one month after the judgment complained of, or within such further time as the Court appealed from, or a Judge thereof may allow.’

The time for appealing expired on the 30th July.

The application is based on an affidavit of the plaintiff, in which he states that on the 3rd day of July he was advised by his solicitor of the judgment of the Court: that he did not see his solicitor after he so heard the result till the 20th day of August, when he for the first time learned that he should have caused notice of appeal to be served within a month of the rendering of judgment: that his solicitor had written since to the defendants’ solicitors asking their consent to an order for leave to appeal being made, but that they had refused to consent: that he is desirous of appealing, and has conferred with counsel in respect to the decision, and is advised that the case is one involving questions of law hitherto undecided, and that he should not rest content with the decision but should appeal to the Court of Appeal: that besides this action there is now pending a claim in the Chancery Division of this Court in which he is seeking to recover \$2000 and interest from the Union Fire Insurance Company: that such claim has been allowed in his favour by the Receiver in the action in which it is pending, but the report allowing such claim has been appealed from with the view, he believes, of seeing how this case shall be decided: the facts upon which such claim is based are in part those disclosed in the evidence in this action; and the decision on the appeal

against such report allowing his claim will, he fears, be affected injuriously by the judgment herein being allowed to stand: that he verily believes he will be greatly injured unless he is permitted to appeal.

Though at the time I was of opinion on the merits the judgment entered for the defendants was right, and still retain that view, the case is not one wholly free from doubt, and I am disposed to grant the leave sought if not precluded by authority from so doing. The clause limiting the appeal to one month with power to the Court or Judge to allow further time, furnishes no rule or guide to the Court or Judge for the exercise of the discretion conferred, and I must, therefore, be guided by the decisions upon the provisions in the English Judicature Act, which are substantially the same. The most recent case that I have seen is that cited on the argument by Mr. Osler. *In re New Callao*, L. R. 22 Ch. D. 484, where it was held that an appeal should not be allowed, although immediately after the decision complained of the solicitors of the party wishing to appeal wrote to the solicitor of the other party, stating that they were surprised to find upon inquiry that no steps had been taken to draw up the order dismissing the application, and adding, they were anxious about the matter as they intended to give notice of appeal. The decision complained of was given on the 3rd August, 1882. On the 10th August the letter just mentioned was written. The letter was not answered, and on the 3rd October the appellant's solicitors wrote again calling attention to it, and intimating that they would draw up the order themselves for the purpose of appeal. On the 30th October the appellant served a formal notice of appeal, and intimated that it was given as supplemental to the notice of appeal contained in the letter of the 10th August. The Court held the appeal must be dismissed as not in time, the letter of the 10th August not amounting to notice of appeal, and there was no such mistake or accident as would justify the Court in extending the time for appeal. *Jessel*, M. R., said at p. 487, upon the question of extending

the time: "I do not think the appellant is entitled to indulgence. In the first place, I think it right to say that I agree with the observations of the other two Judges who were sitting with me in the case of *McAndrew v. Barker* L. R. 7 Ch. D. 701, the late Lord Justice James and Lord Justice Baggallay, as to the meaning of that decision. I mean the observations they made in *re Blyth and Young*, L. R. 13 Ch. D. 419, 420, that it was not intended in *McAndrew v. Barker* to say that the equity from accident or mistake, with which the respondent had nothing to do, did not remain. The words in the judgment are very short: 'Unless there has been on the part of the respondent some conduct raising an equity against him.' Lord Justice Baggallay says: 'This language, though applicable to the case then under consideration, must, I think, admit of some modification where the circumstances are of a special character;' and Lord Justice James says with regard to the same judgment: 'I wish to say that I think it was a little too strong to say that the Court has no discretionary power to enlarge the time for appealing, unless there has been conduct on the part of the respondent raising an equity against him.' The Court did not lay down a positive rule in every case; it was not intended, for instance, to apply to the case of the equity arising from an accident, and therefore I take this opportunity of saying that I concur with them as to the meaning of the language used in *McAndrew v. Barker*. That being so, what is the ground upon which this appellant asks for indulgence? I cannot see any. There is no accident, no mistake. The solicitor knows the difference between the notice of appeal, as appears from his letter, and an intention to appeal, and it does appear to me that there is neither accident nor mistake, nor is there misconduct on the part of the respondents. \* \* It seems to me that there is no ground whatever for indulgence, and that this appeal must be dismissed, with costs."

Cotton, L. J., at p. 492, thus presents the necessity of there being some equity on behalf of the party desiring to appeal to an extension of time: "It is not necessary that

there should be something in the conduct of the respondent which raises an equity against him, but it is necessary that there should be some equity which raises a case for the person proposing to appeal to gain an extension of time. There must be an equity in his favour, either from the act of the other party, or from something else recognised as a ground of equity."

Bowen, L.J., at p. 492, said: "There are two things which, as it seems to me, ought to be kept distinct. On the one side there are a number of rules which prescribe the machinery for carrying out the different steps towards an appeal. The Court has to construe those rules. On the other side there is a further power contained in other rules for the Court to prevent injustice being wrought by slips or misadventures, and in dealing with slips or misadventures, and in extending its indulgence the Court will, of course, be liberal when it sees it is necessary to be liberal in order to do justice, but the liberality which the Court shews in extending its indulgence where justice requires indulgence to be extended, ought not to become laxity in construing the rules which define the machinery which the parties have to put in motion." And again at p. 493: "The second question which we have to consider is, whether, assuming this document to be bad as a notice, which I think it is, the Court should extend its indulgence to rectify the defect. I would not myself, especially as I have not yet had the experience, or anything like it, of my brother members of this Court, try to define the exact measure or limits of the discretion which a Court of Appeal ought to exercise in rectifying a blunder. I should be quite prepared to be liberal when justice had to be done. But here it seems to me there is no sort of ground whatever for rectifying any mistake, or deciding that the parties who wrote the letter are to be placed in a better position on the ground of a slip or mistake; for the best of all reasons, namely, that I do not think there has been any slip, mistake, or accident. I believe what was stated by counsel, that the gentlemen who wrote this document intended at the time to appeal.



I am sure they did, but I do not think they thought for a moment that this was equivalent to a notice of appeal. I fail to see that there was any mistake or inadvertence or accident of any kind whatever."

I have made these long extracts from this judgment, because the language is most singularly suited to the facts presented on this application for indulgence, and it cannot for a moment be doubted if the present were a motion to the English Court of Appeal it would fail, if there is no other ground for its support than the excuse set up by the plaintiff's affidavit—that from the time he heard of the judgment until he chose to call upon his solicitor about seven weeks after, and three weeks after the time for appealing had expired, he did not know the time was limited to one month. If he had not gone near his solicitor for six years, he would have exactly the same excuse, and probably it is very seldom indeed that a layman knows without making inquiry what is the time allowed for appeal. His ignorance on this subject is not a ground for denying to the party who has obtained the judgment of the Court the right he has to have that judgment enforced as promptly as the rules and practice of the Court will permit.

The only other ground stated in the application is, that in another proceeding against another party in another division of the High Court of Justice he may be prejudiced by the judgment in this case. The answer to that is, in that case he can have the right of appeal that by his own *laches* he waived in this, and there is authority against such a circumstance being a ground for granting the indulgence sought: *Craig v. Phillips*, L. R. 7 Ch. D. 249. The case of the *International Financial Society v. The City of Moscow Gas Co.*, L. R. 7 Ch. D. 241 is also a very strong authority against granting the indulgence sought. I have not overlooked the fact that *in re New Callao*, L. R. 22 Ch. D. 484, the Judges giving judgment expressed the view that in that case, as the decision sought to be appealed against was not necessarily a final determination of the rights of the parties, there was



less reason for granting an indulgence than in an action like the present where the judgment is final.. The decision did not turn upon that distinction.

I think I am precluded by authority from enlarging the time to appeal, but in so deciding I do not wish to deprive the plaintiff, (if he thinks it worth while so to do) of the opportunity of applying to the Divisional Court to enlarge the time. In the meantime this motion must be dismissed, with costs (*a*).

## GRANT V. GRANT.

(AND FIVE OTHER CASES.)

*Sheriff's fees—Rent—Taking stock—Possession money—Appeal from local Master's taxation—Rule 447 O. J. A.*

Writs of execution had been placed in the hands of the sheriff of Hastings, under which he made a levy on goods in Belleville and Madoc, leaving them on the premises in which he found them. After the service, which was on the 12th of February, and while the goods were in the debtor's premises, two instalments of rent fell due, on the 1st of March and June, which were paid by the sheriff.

*Held* that this payment should not be allowed, because the goods might have been removed by him before the rent fell due, and being under seizure, they were not liable to distress, and there was nothing in the debtor's lease to accelerate payment of rent on seizure of his goods.

The sheriff paid persons at Belleville and at Madoc for "taking stock" after the levy.

*Held*, that these payments should be disallowed, as they do not appear in tariff, and the local Master was precluded by R. S. O., ch. 66, sec. 51, from allowing anything to the sheriff which was not correct and legal.

It appeared that the deputy-sheriff kept the keys of the store in Belleville, and went himself twice a day to see that the goods were safe.

*Held* that the payment to him of \$2 per day as possession money should have been allowed only if the Master were satisfied that it was necessarily and actually paid, and the item was referred back for reconsideration, it being alleged that the only possession was locking up the store and keeping the key.

*Held*, also, that the sheriff was entitled to charge poundage upon each of several writs, though all were issued by the same solicitor, and were placed in his hands at the same time.

*Held*, also, that the plaintiff properly applied to a Judge in Chambers to review the taxation pursuant to R. S. O., ch. 55, sec. 52, as Rule 447 applied only to the Toronto taxing officers appointed under Rule 438, O. J. A.

[September 20, 1883—WILSON, C. J.]

(*a*) Affirmed on appeal by the Divisional Court, Queen's Bench Division, 22nd November, 1883.

A SHERIFF'S bill of costs had been taxed under sec. 48 R. S. O. ch. 66, and this was an application under sec. 52 of the Act for a revision of the taxation.

*Aylesworth*, for the plaintiffs.

*Clement*, for the defendants.

WILSON, C. J.—The following items are objected to as allowed by the local taxing officer at Belleville.

Rent paid the landlord of the execution debtor for premises in Belleville	\$250
Taking stock at Madoc—allowed....	8
Possession money at Madoc, twenty-nine days \$58 and \$6.....	64
Taking stock at Belleville, two persons at \$4 each per day for ten days, \$80 and \$20—allowed \$60.....	60
Possession money at Belleville, twenty-six days at \$2 per day.....	52

And to the mode in which the poundage has been computed.

As to the rent.

The sheriff got the writ and levied on the 12th of February, 1883, and sold on the 9th March following.

The rent fell due on 1st March, 1883, (\$125,) and on the 1st of June \$125.

The sheriff was delayed in acting upon the executions by reason of proceedings being taken in Court which necessarily delayed them.

The objection taken to the sheriff's claim for rent is, that his seizure was on the 12th February, at which time no rent was due, nor became due until the 1st March, and he should have removed the goods from the premises, as he had sufficient time to do so before the rent became due. That, I think, is a reason why the claim for rent should not be allowed. There is another reason still stronger against the allowance of the item, and that is, the landlord had no claim on the goods, and could not distrain upon them, as

well because there was no rent due at the time of the seizure by the sheriff, as because they were held under the execution and in the custody of the law. And there is nothing in the lease which entitled the landlord to precipitate his payment of rent, as is sometimes provided for, by reason of the delivery of the execution to the sheriff.

The lease enabled the landlord to determine the tenancy if the *term* were taken in execution, but it was not so taken. As the sheriff was, so far as the landlord is concerned, under no obligation to remove the goods, and as the sheriff detained the goods on the premises of the debtor apparently with his assent, there was no occasion for removing them to any different place for sale, and as they were not removed no allowance for a supposed removal can be allowed, so that the whole sum of \$250, must be disallowed, and must be accounted for by the sheriff.

The sums allowed for taking stock, allowed at about \$68, were next objected to, and *Morrison v. Taylor*, 9 P. R. 390, was referred to as a decision in point against the allowance of such a charge.

The taxing officer can allow only such items as "are correct and legal:" R. S. O. ch. 66 sec. 51, and such an item is not allowable by the tariff.

The item apparently intended to cover such a charge in the tariff is, "schedule of goods taken in execution, including copy to defendant if not exceeding five folios, one dollar, and for each folio above five, ten cents." That allowance, however, is for the mere writing of the schedule, and not for the measuring, classifying, and valuing of the goods which requires skilled labour.

It would be a very proper item to allow in all cases where the goods are offered or bid upon at so much on the dollar, now a very usual mode of sale, and that cannot perhaps be done in some cases until the standard or dollar value has been ascertained, but even if the bidding is before the valuation, such valuation must be made before the goods can be paid for.

The section before referred to says the taxing officer shall "strike out all charges for services which, in his opinion, were not necessary to be performed." These words do not authorize the allowance of charges not expressly given by the tariff. They merely give the taxing officer the power to disallow such tariff items for services as were not in his opinion necessary to have been performed.

Such sums must also be disallowed.

The possession money is objected to because it is said it was not paid. It is said "the sheriff himself, through his son, the acting deputy sheriff, was the only one in possession of said stock, and such possession consisted simply of holding the key of the premises." The sheriff's clerk says he was specially directed by the sheriff "to look after and keep possession of the goods, because \$8,400 worth or more of goods were in the shop in Belleville," and he says, "I have been paid the sum charged for my services while I was in possession." If the sum *has been really and necessarily paid* it must be allowed, but otherwise it should not be allowed. Two dollars a day is the sum charged for twenty-six days. If the only possession was locking up the store and carrying the key of it, I should say two dollars a day is too large a sum for that kind of possession. The deponent, George Hope, does not state the kind of possession he had of the goods or premises where they were, although Mr. McMahon, the solicitor for the plaintiffs, swears positively his possession "consisted simply of holding the key of the premises." The taxing officer should reconsider the charge, and require, if necessary, further information and evidence with respect to it.

The plaintiffs then contend the sheriff should not be allowed his poundage upon each writ, but should have his poundage calculated upon the sum of \$6,365.84, the amount for which the goods sold, that is, three per cent. upon the balance after deducting the first \$1,000, "inasmuch as the amount realized was sufficient only to cover the executions of the six plaintiffs, all of which issued from

my office as solicitor for the plaintiffs, and all of which were delivered to the sheriff at one and the same time, and that only one levy was made thereunder."

I cannot make the order with respect to the poundage as asked for. There is nothing to warrant me in doing so.

There is no difference in this respect whether the writs are given by the one solicitor or by different solicitors to the sheriff, or whether they have been given to him on different days or on the same day, or whether, after having all the executions in his hands, the sheriff makes, in fact, only the one levy for all the writs, or whether he levies while he has only one writ, and make no further levy after receiving the other writs. He is entitled to his full fees upon all the writs. In *Tidd's Practice*, 9th ed., 1040, 8th ed., 1084, it is said if the sheriff arrest upon one writ, and detain the defendant upon another writ, he is entitled to his poundage on both writs.

Mr. Aylesworth argued that the plaintiffs should have acted under rule 447, O. J. A., and were barred as they had not followed the directions of that rule. Mr. Clement contended the rule applied only—as the language was express—to the taxations before the *taxing officers* appointed specially under rule 438, and not to taxations by the local officers, and that the plaintiffs were right in applying for a revision under *R. S. O.*, ch. 66 sec. 52 as heretofore for relief to the Court or a Judge, and I am of opinion the plaintiffs are warranted in making this application.

I shall therefore order the sheriff's bill in these different cases to be revised according to the terms of this judgment, and that the reference be made to the local officer at Belleville.

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## VICTORIA MUTUAL V. FREEL.

*Principal and surety—Costs.*

Judgment for a debt was obtained by the plaintiffs against the defendants, who stood towards one another in the relation of principal and surety. The surety paid the plaintiffs the amount of their debt and costs, took an assignment of the judgment, and then proceeded to enforce it against his principal.

*Held*, that the costs as well as the debt were recoverable by the surety, as against his principal.

[September 21, 1883.—*The Master in Chambers.*]

Judgment for a debt was obtained by the plaintiffs against the defendants, who stood to each other in the relation of principal and surety. The surety paid the plaintiffs the amount of their debt and costs, took an assignment of the judgment, and then proceeded to enforce it against his principal.

This was a motion by the principal to reduce the amount endorsed to be levied on the writs of *fi. fa.* issued against him by the surety.

*Aylesworth*, for the defendant Freel, the principal.

*Clement*, for the defendant Foley, the surety.

THE MASTER IN CHAMBERS.—When rightly considered this case presents no difficulty either of fact or law. As to the fact disputed, it is whether Mr. Freel at or before the commencement of the suit made such an acknowledgment of the amount due the plaintiffs as Mr. Foley, his surety, could safely act on as to the fact. The affidavits are numerous, and they are contrary as to the result they must lead to. Quite a number of these affidavits, on either side, are made by gentlemen of good position, not at all connected in interest with either of the parties, and I believe all they have said, that is, as to their honest conviction of its truth. The conclusion I draw is this, that Mr. Freel has not been consistent in his course, and that as to this fact of his indebtedness to the plaintiffs, or the amount of it, he has taken one position at one time and a contrary position at another. If the affidavits I have

referred to are true, which cannot be doubted, this conclusion is inevitable. Without further remark upon it here, I shall look at Mr. Freel's own conduct as a test. This is an action brought against the principal (Freel) and the surety (Foley) jointly. Mr. Freel defended this suit by his own attorney, Mr. Foley being represented by a different attorney. Although Mr. Freel says he admitted the amount, conclusively, before the action brought, yet at a stage of the cause he demanded particulars of the plaintiffs' claim, and when asked by the plaintiffs' attorney to admit the amount to save further proceedings in the cause, he left the office without making such admission. He

gives a reason for this, but the reason does not help him; the fact remains, that by his own course he kept the cause open until the last shilling of costs was incurred. After the cause was entered for trial, both defendants consented to the plaintiffs taking a verdict. Then Foley paid the judgment, and seeks to recover the amount he paid by enforcing the judgment, of which he has obtained an assignment from the plaintiffs, against Freel. Freel's default is the occasion of all, but now he turns round upon his surety and says, You unjust man you cannot get these costs from me though you have paid them. It was your duty to have been more smart and active in paying my debt, and now you cannot expect me to pay the costs. Why didn't you pay before any costs were incurred? That is his position. He is evidently acting under very advanced notions of the law of principal and surety. But Freel himself kept the suit open by his defence and refusal to admit the plaintiffs' case, and so occasioned the costs.

It is not worth a further observation. As between principal and surety, the principal is liable for all costs necessarily incurred by the surety in the matter of the suretyship, but not the costs wantonly or neglectfully incurred. I refer to the last edition of *Byles on Bills*, p. 412; to *Chitty's Work*, last edition, p. 220; to *Mayne on Damages*, ed. 1879, p. 71, *et seq.*

There are some American cases exactly in point, cases of a joint judgment, against principal and surety, which shew the surety to be liable: *Hare v. Grant*, 77 N.C. 203; *Eaton v. Lambert*, 1 Neb. 339. It has been so held also in Mississippi: *Baylies on Principal and Surety*, 343. See also the Treatises of *Baylies* 344, and *Brandt*, sec. 187. I cite the language of Redfield, C. J., of Vermont:

“If, when a surety was sued upon the debt of his principal, and was unable to pay it, and the same went into judgment and was levied upon his land, he must lose all costs recovered, and the expenses of the levy, because he did not pay the principal's debt more promptly than the debtor himself, whose duty it was to do it and save the surety all trouble, it would certainly afford a remarkable instance of absurd refinement, not to say refined absurdity; and if the debt may be recovered (by the surety of the principal) as money paid, so equally may the costs.”

I have seen on more than one occasion remarks of English Judges shewing their opinions that the cases had gone too far, in many instances, in favour of the surety; and it would be well for those who entertain extreme opinions on the subject, to consider what has been said by this American Judge: *Brandt on Suretyship*, sec. 187.

Of course my decision here does not go so far as the language above cited would warrant.

I think this a very plain case both on the facts and the law, and I discharge Mr. Freel's motion, with costs to be added to the endorsement of the writs of *feri facias*.

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## RAMSAY V. MIDLAND RAILWAY COMPANY.

*Examination—Officer of corporation.*

A station agent of a railway company is an officer examinable under R. S. O. ch. 50, sec. 156.

[September 21, 1883.—*The Master in Chambers.*]

[September 28, 1883.—*Wilson, C. J.*]

THIS was an appeal from an order of the Master in Chambers directing the station master of the defendants at Orillia, to be examined as an officer of the corporation under section 156 of the C. L. P. Act, R. S. O. ch. 50.

*Aylesworth*, supported the appeal. He referred to *Oakley v. Toronto, Grey and Bruce R. W. Co.*, 6 P. R. 256; where the chief engineer was held to be examinable as an officer of the company: *Dalziel v. Grand Trunk R. W. Co.*, 6 P. R. 307, where the tie inspector was held not to be examinable: *McLean v. Great Western R. W. Co.* 7 P. R. 258, where the engine driver or the paymaster was held not to be examinable, R. S. O. ch. 50 sec. 156 and sub-sec. 2.

*Clement* shewed cause. He cited in addition *Maitland v. Globe Printing Co.* 9 P. R. 370, and Rule 285 O. J. A., under which he contended the examination could be had, because, by it, "The Court or a Judge, may in any cause or matter where it shall appear necessary for the purposes of justice, make an order for the examination up on oath \* \* of any witness or person, &c.

WILSON, C. J.—The superintendent of the defendants' railway says he has the supervision of station agents in his division. The duties of such agents are to sell tickets and receive payment for them, to receive freight for shipment, and to deliver freight arriving at the station for delivery, and to receive payment for it; to take charge of the servants about the station; such an Agent is also subordinate to and under the orders and subject to the instructions of the general superintendent, and also subord-

inate to and under the orders and instructions of the head of the traffic department. He has no original jurisdiction of his own, and he is not appointed by the board but by the deponent as superintendent of the line. His duties are those of a clerk or employee acting under the orders of the superintendent, and that Mr. Geddes, who is sought to be examined, holds the position of station agent and no other position on the line. In answer it is said, the contract on which this action is brought was signed by the said Geddes, as the deponent, one of the plaintiff's solicitors, believes.

The statute provides that in the case of a body corporate "any of the officers of such body corporate touching the matters in question in the action" may be examined, and "when the officer of a body corporate has been so examined \* \* such body corporate shall be deemed to be fully represented by such officer."

In *Dalziel v. Grand Trunk R. W. Co.* 6 P. R. 307 the Master in Chambers said: "The tie inspector is not immediately responsible to the directors, and is not, I think, 'an officer' within the meaning of the Act." And on appeal, Harrison, C. J., supported the decision of the Master.

It is difficult to say precisely who is an officer and who is not an officer of a body corporate under the general words of the statute, "any of the officers of such body corporate," and who may, for the purposes of such examination "be deemed fully to represent such body corporate."

The expression "any of the officers" must mean, I think, others besides the highest governing body, such as the president and directors. They make all appointments to office, and are elected by the shareholders for that purpose,

The general manager of the body corporate must be an officer who is examinable, because he is appointed by the board to conduct the whole business of the company. The shareholders cannot, of course, attend to such matters, nor can the directors, and if they could attend to them they would not probably have the ability or qualification to manage them. They therefore have their general manager



or some such person, by whatever name he may be called who is their chief executive officer. He cannot, however, do everything himself. The business of the company must therefore necessarily be subdivided among others, such as the Chief Engineer, the Chief Superintendent of freight, and the like. Each department for the transaction of the business of the company becomes a distinct subdivision for the transaction of the particular business of that department.

What these subdivisions are I do not pretend to say, for I have no knowledge of or information on the subject. There may be a department specially devoted to passenger traffic, to baggage, to the purchase of supplies, to the internal police of the company, and perhaps for other purposes, and in such case I should say the head of that department however he was appointed, was an officer of the company, and could represent the body corporate on and for the purpose of his examination.

Now the superintendent of freight, or the heads of the other departments such as I have stated, if there are such departments, may not be able to manage personally the whole of the work committed to their supervision, and they may, of course with the knowledge and consent of the chief governing body, or of the general manager, subdivide their respective departments by having freight, passenger traffic, and the like, controlled at certain convenient places along the line by representatives or agents, or by whatever other name they may be called, such persons acting in their respective subdivisions with the like powers as their superiors in the like larger departments under their control.

The chief subdivisions of the general business of the railway are, I should say from such general knowledge as people have of such matters, the stations along the line and the person in charge of a station is the superior agent, manager or officer, or by whatever other name he is called, in his own department. He is, in fact, as he is usually called, "the station master." He is of course subject to

the orders and instructions of his superiors ; and although he may not, according to the routine in such cases, report to the general manager or to the directors, it is certain he would be bound to report to them if called upon by them to do so, and it is certain if he refused to do so, the directors or manager could dismiss him.

I do not know who selects or locates the stations—I should say it was not done by the directors—but when selected they are the stations of the company : nor do I know, nor do I think it of much consequence I should know, who appoints the station agent or station master : but I do know when he is appointed, whether by the directors, or by the general manager, or by the superintendent of the particular part of the line, he does become the agent and employee of the company and is the *officer* of the company in his own department, and as such he is examinable under the statute, and can and may represent the body corporate on and for the purposes of his examination.

The statute should, I think, receive a liberal construction, for the knowledge of the business and affairs is and can only be in the agents and officers of the company who transact it,

How far the word *officer* may be carried I do not now consider ; but I have no hesitation in saying that an office or agency established by or for the company at these stations, and a person appointed by or for the company to manage and carry on its affairs, of the important and diversified nature of which they consist at these stations, and possessing and exercising the extensive powers with which he is and must be entrusted to enable him to discharge his duties towards the company, do constitute such a person an officer of the company within the meaning of the statute.

The station is like to the branch or bank agencies spread over the country, and I should be surprised to hear it argued that such local bank agent was not an officer of the bank.

In this case, too, it is said the station master actually executed the contract upon which the action is brought.

I affirm the decision of the Master in Chambers, and discharge the appeal, with costs.

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DONOVAN V. BOULTBEE.

*Postponement of cause—Remanet—Notice of trial.*

When a cause is postponed by the order of the Judge at the Assizes, upon the defendant's application, it is a remanet, and no notice of trial for the next Assizes is necessary, under the rules of 1875, (37 U. C. R. 528) and the O. J. A.

[September 21, 1883.—*The Master in Chambers.*]

[September 28, 1883.—*Wilson, C. J.*]

THIS was a motion by the defendant to strike out this cause from the list of cases for trial at the Toronto Autumn Assizes, 1883. At the preceding Summer Assizes the cause was upon the list, and the trial was postponed by order of the Judge at the trial, upon the defendant's application, with the condition that the defendant should pay the costs on the final result in any event of the cause. The clerk of Assize placed the case upon the list for the next (Autumn) Assizes without any direction from the plaintiff or defendant. No notice of trial was served.

*H. J. Scott*, Q. C., for the defendant.

*J. A. Donovan*, the plaintiff in person, contra.

THE MASTER IN CHAMBERS.—In the case of a remanet I must suppose that no new notice of trial would be necessary by our Rule of Court of 1876. (See the rule in 37 U. C. R. 528.) Is this a remanet? During the Assizes of last summer the presiding Judge, by order, put off the trial till the next Assizes, that is the present Toronto Assizes. The words of the order are that the trial should be postponed, and he imposed a condition as to costs which would not

apply to a remanet proper, that is, that defendant should pay the costs on the final result in any event of the cause. By Rule 272 O. J. A. the Judge may postpone or adjourn the trial for such time, and upon such terms, if any, as he shall think fit. The Judge, therefore might have passed over an Assize, and have ordered the case to be tried, as suppose in this case, next winter or next spring, or he might have ordered the trial for a future day at the then present Assize, all according to the requirements of justice in the particular case, and the terms might be very inconsistent with our ideas of a remanet. There might be the addition of parties, which is not an uncommon case, or a necessary change of the pleadings, which is also a common case. In *Sweet's Law Dictionary* it is said that a remanet, in the Practice of the Queen's Bench Division, is an action which has been set down for trial at one sittings, but has not come on, so that it stands over to the next sittings. In *Archbold's Queen's Bench Practice*, 280, it is said a notice of trial must be given, though a special day is fixed by a rule of Court for the trial, or the plaintiff has undertaken to try at a particular time and place, or a new trial is ordered. And further that where a cause is put off after having been entered for trial (elsewhere than in London or Middlesex) after due notice of trial, though by a rule or order of the Court or of a Judge, or if it is made a remanet at the Assizes, before it can come on for trial, it must be entered afresh, and for this purpose a fresh notice of trial is necessary.

I suppose that to be different in this country in the case of a remanet under our rule of Court of 1875. But a distinction is taken as to a cause put off by order and a remanet, which I think is true.

And I think this case, under the circumstances, was not a remanet.

I must grant the motion, without costs.

WILSON, C. J.—The cause was entered for trial at the Summer Assizes for the County of York, now last past.

The defendant had the trial postponed by order of the Judge at the Assizes until the Fall Assizes, now going on. The statement of pleadings remained with the clerk of Assize when the trial was postponed, and it was entered by him on the present Fall Assize list as a remanet, or among the causes which were remanets from the former Assizes, and no notice of trial for the present Assizes has been given.

The Master in Chambers, on the application of the defendant, has directed the cause to be struck out of the present Assize list as a cause for trial, because no notice of trial was given for the present Assizes.

The plaintiff has given notice of motion by way of appeal from such decision, and he has given only one day's notice of such motion by leave of the Master in Chambers.

On the 25th of September *Scott* shewed cause. He objected to the notice of motion, that only one day's notice of it had been given, and the Master in Chambers had no power to grant such a leave to the plaintiff when the motion is made, or is to be made, to a Judge, or to any other person than to himself, and that a notice of trial should have been given for the present Assizes. He referred to: *Arch. Q. B. P.* 280; *Sweet's Law Directory*, "Remanet;" *Macaulay v. Phillips*, 6 P. R. 77.

*Donovan* supported the motion. He cited the Rules of Court in 37 U. C. R. 528; *Shepherd v. Butler*, 1 D. & R. 15; *Stockton and Darlington R. W. Co. v. Fox*, 6 Ex. 127; *Claudet v. Prince*, L. R. 2 Q. B. 406; *Wharton's Law Lexicon*, "Remanet." The practice, up to the time of the rules below mentioned, passed in Michaelmas Term, 39 Vic. December, 1875, was considered to be, as stated in *Macaulay v. Phillips*, 6 P. R. 77, that "a notice of trial is necessary to be given on a cause to be tried, however that cause may go down for trial, whether as a remanet, or put off from one Assize to another by Judge's order, or taken down to trial by rule of Court or Judge's order."



In Michaelmas, 39 Vic., December 4th, 1875, the following entries were passed:

1. In all causes where the record is duly entered for trial at the Court of Assize, and *Nisi Prius* it shall be deemed to be entered and remain on the list of causes for trial, until it is tried or otherwise disposed of, either at the Court at or for which it is entered, or at a subsequent Court.

2. If any records entered for Trial be not tried or otherwise disposed of at any particular Court of Assize, and *Nisi Prius* they shall, unless the Court otherwise order be made Remanets, and as such stand at the head of the List of Causes for Trial at the next ensuing Court, and so from Court to Court, till tried or otherwise disposed of.

3. In the case of Remanets, no Notice of Trial or Assessment, other than the first or original Notice of Trial or Assessment, shall be given or necessary.

4. The Party entering the Record for Trial or Assessment may, after the close of the first or any subsequent Court, countermand his Notice of Trial or Assessment, by giving a Written Notice of Countermand to the opposite party, and to the Clerk of the Court of Assize, and *Nisi Prius* at least ten days before the ensuing Court."

Stopping at this point, what was the practice introduced by these rules?

It was, that when the record was entered for trial, it should remain for trial until the cause was tried or otherwise disposed of, either at the Assize it was entered, or at any future Assize.

That rule provided, that when the record was entered for trial, it shall always remain for trial until tried or otherwise disposed of.

The meaning of the words or *otherwise disposed of* than by trial, mean, when the cause is so disposed of so that it is removed from the list of causes for trial, that is, disposed of by a reference or by settlement between the parties, or struck off the list as improperly or irregularly entered, and the like. When a cause is postponed until the next

Assizes, it is not disposed of any more than if it were postponed for a week or a month, and that is not a being disposed of within the meaning of the rule.

Suppose the trial of a cause were postponed for a week, and the Assizes closed before the end of the week, would that be a disposition of the cause within the meaning of the rule? I think it would not. The postponement for a week was not a disposal of it under the rule, otherwise according to the defendant's contention there must have been a new entry of the record, or a fresh notice of trial at any rate; and if it was not a disposition of the cause at the time of such postponement, did the termination of the Court before the time of postponement elapsed constitute a disposal of it? In my opinion it would not. And in that case, at any rate, the cause would remain over for trial at a future Court, because it had not been tried or otherwise disposed of. And as I have said, I see no difference between such a disposal of the cause, and a direct postponement of the trial until a future Assize. In each case the cause has not been tried, and it remains to be tried, and stands still in the list of causes for trial, because it has not been tried *or otherwise disposed of*.

The *disposal* of anything relates as well to the good order and arrangement of it as to the dealing with it in any other manner: see *Worcester's Dictionary*; *Crabb's Synonymes*.

In this case the order and arrangement of the trial or time of trial was provided for, and nothing more; and whether that was to a future day of the same Assize or to a future Assize can make no difference.

The next rule provides that records entered for trial, but not tried or otherwise disposed of, *are to be made remanets, and as such* shall stand on the lists of causes for trial at the next or any future Court.

This rule, making all cases not tried or otherwise disposed of remanets, gives the best definition of what a remanet is for the purposes of these rules.

Rule 3 declares that in the case of *Remanets* no other

Notice of Trial or Assessment other than the one originally given shall be necessary.

And the 4th rule confirms that construction by providing that causes in the list of causes for trial shall remain for trial, unless the notice originally given is expressly countermanded.

It was not supposed that the mere postponement of the trial by a Judge, especially on the motion of the defendant, could be a countermand, or equivalent to a countermand of the plaintiff's notice of trial, which is to remain in force so long as the cause is to be tried.

By these rules then, in my opinion, the plaintiff was not required, nor was it necessary for him to give a new notice of trial for the Assizes to which the cause was postponed by the Judge, on the motion of the defendant, nor, as I think, even if the postponement had been on the motion of the plaintiff himself.

The question then is, has the Ontario Judicature Act made any change in the practice in such a case?

The rules to be referred to are 170, 171, 258, 272. The first two rules relate to withdrawing the record or the cause entered for trial, which cannot now be done without leave of the Judge, or the consent of parties in writing.

Rule 258 requires the notice of trial to state the place and day for which the cause is entered for trial.

That, I think, does not affect the case, for, after the entry of the cause, the place is fixed and known, and the day for trial is then regulated by the practice as expressed in the existing rules of the Court.

Rule 272 provides that the Judge may postpone or adjourn the trial for such time, and upon such terms as he shall think fit.

The operation of these rules is, that the cause, when once entered, cannot be withdrawn but by leave of the Judge or the consent of parties. The Judge may, however, postpone or adjourn the trial—the *trial*, it will be observed—the cause still remaining in the cause list for trial.

It is clear, in such a case, a notice of trial specifying the *place* of trial can not be necessary. Nor can it be required that the day for trial should be stated when the cause is to be entered for trial, as in the case of *remanets*, and which are to be entered at the head of the list of causes for trial at the following Court.

The Judicature rules confirm, in my opinion, the rules of 1875.

The rules and practice in a case like the present make it unnecessary for the plaintiff to serve a new or fresh notice of trial for the Assizes to which the trial has been postponed.

I shall therefore make the motion absolute but without costs, as it is a new point of practice.

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### HOLLINGSWORTH V. HOLLINGSWORTH.

*Security for costs—Application for—Affidavits on information and belief—  
Shewing state of cause.*

An affidavit filed by the defendant set out that “the said plaintiff has been for some time past, and is now residing, as I am informed and believe, out of the Province of Ontario, and beyond the jurisdiction of this Court, having taken up his residence in New York, one of the U. S. A.”

*Semble*, that a statement of the plaintiff's residence out of the jurisdiction, on information and belief is not sufficient.

*Held*, that the foreign residence of the plaintiff was here positively sworn to, and the affidavit was sufficient in substance for the Court to act upon in ordering security for costs.

*Quere*, whether in a proceeding before him, a County Court Judge can of his own motion examine proceedings pending in a Division of the High Court, but *held* that the defendant should have been allowed to produce such proceedings in order to meet technical objections as to the state of the cause not being shewn.

[September 28, 1883.—Wilson, C. J.]

THIS was a motion to discharge the order of the local Judge at Brockville, discharging a summons to the plaintiff to shew cause why he should not give security for costs, on the ground that the defendant had not shewn sufficient grounds to entitle him to the security he applied for, and because the learned Judge should have looked at the pro-

ceedings to have ascertained the state of the cause, and because leave to file further affidavits was refused; and that the plaintiff do shew cause before the Judge in Chambers why the plaintiff should not give to the defendant security for costs.

An affidavit filed by the defendant, set out that:—"The said plaintiff has for some time past and is now residing, as I am informed and believe, out of the Province of Ontario, and beyond the jurisdiction of this Court, having taken up his residence in the state of New York, one of the U. S. A."

*Tilt*, Q. C., for the defendant, supported the motion. It was objected before the local Judge that the defendant had not shewn whether an appearance had been entered in the cause, and had not shewn that issue had not been joined before the motion was made. In answer to that *Hall v. Brigham*, 5 P. R. 464. shews the Court may look to its own proceedings to ascertain what the state of the cause is. The demurrer was discharged upon the further ground that the foreign residence of the plaintiff was sworn to only upon the information and belief of the deponents. The case of *Morgan v. Hellems*, 1 P. R. 363, shews such affidavits are sufficient.

*A. H. Marsh*, shewed cause. The County Court Judge had no authority to grant the summons upon the facts disclosed to him, as it was not shewn the action was brought in his county, or that the solicitors for such parties resided or had an office in his county, Rules 422, and 422a. Affidavits for security for costs on information and belief of the foreign residence are not sufficient, G. O. Chy. 258. If the affidavits are so expressed they should shew sufficient for grounds the information and belief, *Arch. Q. B. Practice*. 13th ed., 1144, Har. C. L. P. Act 633. And state of cause should be shewn, *Arch. Practice* 13th ed. 1144, Har. C. L. P. Act 634.

WILSON, C. J.—As to the Court having the power to examine its own records and proceedings, there is no doubt



of the power ; the question is as to the practice ; and the rule generally is that the affidavit must make a complete case, and must bring before the Court every proceeding which it is desired the Court should examine.

In *Hall v. Brigham*, 5 P. R. 464, the state of the cause appeared on the papers filed in Court and produced in Chambers at the request of the defendant, and upon such a state of facts, and the case of *Craven v. Smith*, L. R. 4 Ex. 146, there referred to, the proceedings were looked at although they were not mentioned in the affidavits filed. In the case of *Craven v. Smith*, just mentioned, a copy of the pleadings was produced on the argument.

It does not appear the proceedings in the cause were before the learned County Court Judge at the time the notice was argued, and I doubt whether he had the right to examine the proceedings in the Queen's Bench Division of his own motion, unless brought before him.

This objection applies as well to the necessity of shewing the state of the cause, as for the purpose of shewing in which county the writ had been issued.

The chief objection taken was that the affidavits did not state positively that the plaintiff was or resided out of the jurisdiction of the Court, but only that he did so upon the information and belief of the deponents. If that be so, and I will assume it for the present, it seems to be the better opinion that such a statement on information and belief is not sufficient to entitle the party to security for costs.

*Joynes v. Collinson*, 13 M. & W. 558 is in part against the sufficiency of such an affidavit ; and the reason is, that if the deponent do not know positively of the foreign residence, the defendant can compel the plaintiff's solicitor to inform him where the residence of the plaintiff is, and if it appear then that there is a foreign residence, the statement of the fact that the plaintiff's solicitor had informed the defendant to that effect, would be sufficient to entitle the defendant to security for costs.

It may be reasonable enough to require the defendant to

state positively the foreign residence, if he do not choose to take the means to ascertain where the residence is, in the manner provided by the statute, or to require him to state the grounds at any rate for his information and belief: *Arkenheim v. Colgrave*, 13 M. & W. 620; *Gibbons v. Spalding*, 11 M. & W. 173.

In the affidavit of Ira Malloy, I am of opinion, however, the foreign residence is positively sworn to. It is expressed in this manner, "the said plaintiff has for some time past, and is now residing as I am informed and believe out of the Province of Ontario, and beyond the jurisdiction of this Court, having taken up his residence in the State of New York, one of the United States of America." Whether the deponent intended to state the latter part of the clause as a matter of information and belief I may conjecture, but I cannot say positively. I can say, however, that in the ordinary construction of the language he has sworn positively that the plaintiff has "taken up his residence" abroad. His affidavit is not inconsistent; it is to this effect, "I am informed and believe the plaintiff is residing abroad, having taken up his residence in New York State." That is, "I believe he is residing abroad, because he has taken up his residence in New York State." In that construction I think the affidavit is sufficient in substance.

I think, on the authorities before mentioned, the learned Judge should have allowed the defendant to produce on the argument the proceedings in the cause to meet the technical objections which were taken, and that he should have held, as I have no doubt he would have held the affidavit of Ira Malloy sufficient in substance if the special wording of it had been called to his attention.

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## MORTON v. GRAND TRUNK RAILWAY COMPANY.

*Trial—Postponement of—Second payment of fee on entering record.*

Where the trial of a cause was postponed till the next Assizes, defendants to pay the costs.

*Held*, that no second fee was payable to the deputy clerk of the Crown upon entry of the action for trial at the later Assizes, and that when so paid by plaintiff, such fee was not taxable against defendants.

[October 12, 1883.—*Wilson, C. J.*]

THIS action was entered for trial at the Elgin Fall Assizes, 1882, when, on the application of defendants, it was by order of the Judge presiding at such Assizes, postponed till the next Spring Assizes for the said county, and all costs of such postponement were ordered to be paid by the defendants on the final taxation of costs in the cause, in any event of the cause. The action was tried at the Spring Assizes, 1883, and the plaintiff obtained a verdict. Upon taxation of his costs of the cause, the taxing officer at Toronto disallowed an item of \$6, sworn to have been paid by the plaintiff to the deputy clerk of the Crown at St. Thomas, as for a re-entry of the case for the Spring Assizes.

A previous payment of \$6 had been made to the deputy clerk of the Crown by the plaintiff, upon the occasion of the original entry of the action for trial in the fall of 1882, and such first payment was allowed by the taxing officer.

The plaintiff now appealed from the disallowance by the taxing officer of the item in his bill charged in respect of the second payment.

*Dickson*, (Blake, Kerr, Lash & Cassels), for the plaintiff argued that the second payment had been necessarily made by the plaintiff,—the officer insisting on it—and should be allowed: the cause had not been made a *remânet*, but had, been at the Fall Assizes “disposed of” by being postponed. The deputy clerk was entitled to charge the entry fee a second time, and had in fact, since receiving it, accounted for it, and paid over the proper portion of it to the proper authorities according to law.

*Aylesworth*, for the defendants. The cause once entered remained entered and was not disposed of till tried. The \$6 in question, and here paid twice, included \$1 as for passing the record, a charge that manifestly was not payable twice in the same cause. Before the passing of 44 Vic. ch. 8, Ont. these fees were payable in law stamps, and the stamps once affixed and cancelled remained as payment of the entry fee till the cause was tried, whenever that might be.

WILSON, C. J., held that the taxing officer was right in declining to allow the charge for payment on the entry of the case at the second Assizes, on the ground that the fee was not payable the second time, and if paid by plaintiff was not taxable as against the opposite party.

*Appeal dismissed.*

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## WHITE SEWING MACHINE COMPANY V. BELFRY ET AL.

*Taxation—Duty of taxing officer—Division Court costs—Jurisdiction of Division Court.*

An action for the price of two distinct parcels of goods sold and delivered. The defendants accepted a bill of exchange for each parcel, one bill being for \$103.80, and the other for \$106.40. At the time the action was brought the second bill had not matured, as was alleged by the defendants, and afterwards admitted by the plaintiffs. Upon the application of the plaintiffs the Master made an order, under Rule 322 O. J. A., for final judgment against the defendants for the first parcel of goods sold and delivered, that is, for \$103.80, with interest and costs of suit, including the costs of the application, "to be taxed according to the course and practice of the Court."

Under this order the taxing officer allowed the plaintiffs County Court costs on that part of his claim upon which they obtained the order for judgment, and he allowed to the defendants the full costs of the High Court of Justice on that part of the plaintiffs' claim upon which the defendants succeeded, that is, upon the claim for \$106.40, the price of the second parcel of goods.

Upon an application by the defendants to revise the taxation :—

*Held*, in that it was the duty of the taxing officer to look at the pleadings, and if necessary to receive affidavits so as to ascertain the facts of the case.

(2) That Division Court costs only should have been taxed to the plaintiffs, as the amount for which they obtained judgment was ascertained by the signature of the defendants, and was therefore within the competence of the Division Court.

In that the defendants should have Superior Court costs down to and including the statement or defence, which would not have been required but for the plaintiffs claiming improperly the price of the second parcel of goods, which was not due, and also their costs of this application, with a set-off *pro tanto* against the plaintiffs' judgment and costs.

[October 12, 1883.—*Wilson, C. J.*]

THE Master in Chambers made an order, at the instance of the plaintiffs, for final judgment against the defendants for the sum of \$103.80, with interest thereon from the 15th of January, 1883, and costs of suit, including the costs of this application, to be taxed according to the course and practice of the Court.

The taxing officer allowed the plaintiff County Court costs on that part of his claim upon which he obtained the order for judgment, and he allowed to the defendant the full costs of this Court on that part of the plaintiffs' claim upon which the defendant succeeded.

*Shepley*, for the defendants, contended before the taxing officer that the plaintiffs were entitled to Division Court costs only upon that part of their claim on which they had obtained an order for judgment, and not to County Court costs.

*Aylesworth*, for the plaintiffs, contended that they were



entitled to County Court costs, because their right to judgment was for \$103 for goods sold and delivered, and the Master in Chambers had not restricted the plaintiffs to any particular class of costs, and County Court costs should be allowed.

The defendants applied to the Master in Chambers to amend his order by directing the taxing officer to consider upon the taxation all questions as to costs upon the facts and circumstances set out in the pleadings, and to adjudicate upon the same as fully as the Master could or would do; or to direct the taxing officer to allow Division Court costs only to the plaintiffs, and to tax to the defendants their costs of and subsequent to their statement of defence, as well as the difference between their solicitors' and clients' costs of the action and what these costs would have been had the action been brought in the Division Court.

That notice of motion, after argument, was dismissed by the Master in Chambers, without costs.

Notice of motion was then given by the defendants, to be heard before the presiding Judge in Chambers, that the defendants would apply for an order to revise the taxation of the taxing officer upon the objections taken by the defendants to the taxation of the said officer.

The same counsel appeared.

*Shepley* raised the following objections to the ruling of the taxing officer: that the said officer had power to inquire whether the amount for which the order directed judgment to be entered had been liquidated by the signature of the defendants or not, and to receive evidence upon that point, whereas the taxing officer determined he had no such power: that the same officer allowed to the plaintiffs County Court costs instead of Division Court costs although the pleadings and proof tendered to the taxing officer shewed the sum for which the plaintiffs were entitled to judgment was within the jurisdiction of the Division Court: that no more costs should have been allowed to the plaintiffs than upon a judgment by default, as the defen-

dants would not have put in any defence if the plaintiffs had sued for the amount properly due to them: that the taxing officer disallowed to the defendants the difference between their costs of defence in this Court and the sum they would have been if the action had been brought in the Division Court; and that the taxing officer did not allow to the defendants their costs in full subsequent to their appearance to this action in this Court.

*Aylesworth*, contra. The taxing officer did examine the pleadings, and saw the plaintiffs were suing for goods sold and delivered, for and upon which the plaintiffs had got an order for judgment for \$103, a sum beyond the jurisdiction of the Division Court, and he therefore taxed to the plaintiffs County Court costs. The taxing officer could not consider that the plaintiffs might have sued on the bill signed by the defendants for the said goods sold and delivered. It is a matter for the consideration of the Master in Chambers. The matter came before the taxing officer as if upon a verdict for the plaintiffs and no certificate for costs to either party. The defendants cannot set off costs, as they have no order for the same and are not within the R. S. O. c. 50, sec. 347, there not having been a trial between the parties: *Morse v. Teetzel*, 1 P. R. 375; *Cumberland v. Ridout*, 3 P. R. 14; *Johnson v. Morley*, 3 P. R. 217. The question is not whether the claim is liquidated, but whether the action was brought upon a claim within the Division Court Act of 1880, by reason of its being ascertained by the signature of the defendants. The action not being brought upon the instrument which ascertained the amount by the signature of the defendants, does not affect the plaintiffs' right to such costs which they would have been entitled to, as if there had been no such instrument: *Kinsey v. Roche*, 8 P. R. 515; *Wiltsey v. Ward*, 9 P. R. 216, 3 C. L. T. 160.

WILSON, C. J.—The plaintiffs sold to the defendants two different parcels of goods, and for each parcel took

from the defendants a bill or note for the amount or price of the same. One bill was for \$103.80, and the other for \$106.40.

The plaintiffs, on the 15th of May, 1883, sued the defendants for the price of these goods, charging the defendants as liable to them for goods sold and delivered. At that time the second bill was not due, nor, of course, had the day for payment of the goods sold and delivered for which the second bill was given elapsed. The defendants paid the second bill. They pleaded all these facts; and the plaintiffs, not being able to controvert them, submitted to take judgment only for the price of the goods sold and delivered which was covered by the first bill.

It appears then, clearly, that the plaintiffs brought their action for the recovery of the price of the first parcel of goods sold and delivered, and that the price of such goods was, at the time of the sale and delivery, ascertained by the signature of the defendants.

In such case it is quite plain the plaintiffs are not entitled to recover costs upon any higher scale than such a state of facts entitles them to; and that, in my opinion, beyond any question, is according to the scale of Division Court costs only. Rule 511 is too clear upon the point. And if it had not been for the rule it may be the Master in Chambers should have determined the scale of costs by his order, if the former practice were not still prevailing in full force; but I think it would be found the former practice was still applicable to such a case.

It is impossible the plaintiffs can recover more costs by suing for the price of goods sold and delivered when a bill or note has been taken for the price, than they can when they sue upon the bill or note. And it makes no kind of difference when the price became ascertained by the signature of the defendants, whether it was at the time of the original transaction or at any time afterwards, so long as it was before action brought.

The taxing officer should have examined the pleadings, and the statement of defence disclosed them all, and none

of them were denied by the plaintiffs; on the contrary, they obtained judgment upon such statement of defence, as an admission of the true facts of the case.

The taxing officer should also have received affidavits, if necessary, to ascertain what were the true facts of the case.

In my opinion, upon the Master's order the taxing officer must, upon the proceedings and upon any other facts brought to his knowledge by affidavit or otherwise, determine the scale of costs to be allowed to the plaintiffs upon and in respect of their recovery for the \$103.80; and that is the Division Court scale. And he will allow to the defendants their full Superior Court costs down to and including their statement of defence, which would not have been incurred but for the plaintiffs claiming improperly the price of the goods which was not then due.

And I allow to the defendants their costs of this application. The whole of the defendants' costs so taxed to them, to be set off against the amount of the plaintiffs' taxed costs; and if any part of the defendants' costs is not covered by the plaintiffs' costs, then the excess of the defendants' costs shall be set off against the judgment debt and interest of the plaintiffs.

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## CARNEGIE V. FEDERAL BANK.

*Examination of witness—Rule 285 O. J. A.*

An order for the examination of a witness before trial under O. J. A., will not be made where no greater necessity for it is shewn than the convenience of the party who applies for it in preparing, and presenting his case for trial.

[October, 19, 1883.—*Ferguson, J.*]

THIS was an appeal from an order that Charles Holland, the general manager of the Ontario Bank, should attend before a special examiner, and submit to be orally examined touching the account of stock of that bank held in the name of H. S. Strathy in trust, and that he should bring with him and produce all books, powers of attorney, cheques, and other documents connected with the stock so held in trust, and in question in this action.

It was further ordered that the examination should be filed, and that an office copy or copies of it might be given in evidence at the trial.

*J. R. Roaf*, for the plaintiffs.

*Cattanach*, for the defendants.

FERGUSON, J.—The order in question was made, as was stated at the bar, under the provisions of Rule 285, O. J. A.

It was admitted that the object was to obtain discovery from a witness before the trial; Mr. Holland not being a party to, or having any interest in the action, being simply in the position of any person liable to be called as a witness at the trial. It was not shewn that there was any reason for his examination, such as his being seriously ill, his desiring or being about to leave the country, or the like. and it did appear by the statements and admissions of both counsel that Mr. Holland is able, ready, and when called upon by subpoena willing, to attend at the trial and give evidence.

The rule having the marginal number above is Rule No. 4, of Order No. 32, and this order is one upon,



‘evidence generally,’ and its first provision is, that in the absence of any agreement between the parties, and subject to these rules, the witnesses at the trial of any action or at any assessment of damages, shall be examined *viva voce* and in open Court; but the Court or a Judge may, &c. The whole of the provisions should I think be read together, and a fair interpretation given to all.

The question raised upon this appeal seems to be this, can a party to an action properly obtain such an order as the one now in question for the examination of every person who may possess any information or any document having relation to the matter in dispute, whenever it appears *necessary for the purposes of justice*, such necessity being nothing more than *the convenience of the party who applies for the order in presenting his case for the trial*. Counsel for the respondent could place the necessity on no higher ground than this. I have examined all the authorities referred to by counsel in an elaborate argument, and I cannot think that they support the contention that such an order can be properly made. A case much relied on by the respondent is *Fisken v. Chamberlain*, 9 P. R. 283. The question raised there was on a motion to rescind an order for the examination of a party to the suit, the defendant Somerville, and in the facts was entirely different from the question in this case, upon this appeal; and I cannot think that the learned Chancellor, who decided that case, intended that the language he employed should be so understood as to support the contention of the respondent here, and I am of the opinion that it does not support it; and whatever may be the full meaning of rule 285, I am of the opinion that its meaning does not comprehend authority to make an order such as the one now in controversy, when no greater necessity for making it appears than the one to which I have alluded, namely, the convenience of a party in preparing his case. I desire to add that it is with some hesitancy I express an opinion differing from that of the learned Master in Chambers, but entertaining the opinion, (after as full a consideration as I have

been able to bestow upon the subject), my duty is to state it here as I do. I think the appeal should be allowed, and I do not see any good reason for withholding costs.

*Appeal allowed, with costs.*

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RE DONOVAN.

WILSON V. BEATTY.

*Money in Court—Security—Payment out.*

On the 16th November, 1881, an order was made directing D. to pay a certain sum of money into Court. D. appealed from this order to the Court of Appeal, and for the purpose of staying execution, instead of giving security, as required by R.S.O. c. 38, sec. 4, he paid this sum into Court, being authorized so to do by an order in Chambers. On the 27th October, 1883, the Court of Appeal reversed the order of 16th November, 1881. The respondents then gave notice of appeal to the Supreme Court of Canada.

*Held*, that the money paid in by D. must be taken to have been so paid in lieu of the bond required by the statute; that when the decision in appeal was given in D.'s favour, the money had served the purpose for which it was paid: and that it ought to be repaid

[November 20, 1883.—*Proudfoot, J.*]

On the 16th November, 1881, an order was made directing Mr. Donovan to pay into Court \$2,127.31, together with some sums for interest. Mr. Donovan appealed from that order, and for the purpose of staying execution, instead of giving security as required by R. S. O. ch. 38, sec. 27, sub-sec. 4, he obtained from the Master in Chambers on January 16th, 1882, an order authorizing the payment into Court of these sums on or before January 20th. In pursuance of that order he paid the money into Court. He swears in an affidavit that the money was so paid to stay the execution.

On October 27th, 1883, the Court of Appeal reversed the order of November 16th, 1881.—“The dismissal of the petition and the return to the appellant of the security given by him in respect of the appeal, whether by bond or by money deposited or paid into Court in lieu of a bond, to be without prejudice to any application the petitioners may be advised to make in relation to the matter contained in the petition.”

Donovan now applied for the re-payment to him of the money so deposited.

PROUDFOOT, J.—The application is resisted by the respondents on the ground that they have given notice of an appeal to the Supreme Court, and intend, in good faith to prosecute the appeal, and that they apprehend danger to the fund if allowed to be paid out.

The notice of appeal to the Supreme Court was given on Saturday night, the 17th instant, and would seem therefore not to be within twenty days after the decision as required by 38 Vict. ch. 11, sec. 21 (D.), and no enlargement of the time to appeal has been obtained.

Irrespective of this, however, I think the money should be returned to Mr. Donovan. The cases to which I was referred, of *King v. Duncan*, 9 P. R. 61; *Billington v. The Provincial Ins. Co.*, Ib. 67, and *Lindsay Petroleum Oil Company v. Hurd*, 3 Ch. Ch. R. 16, were all cases of money paid in pending an appeal to the Court of Appeal. In the first case my brother Ferguson held that it was discretionary with the Court to order the return of the money, and he there allowed it to be withdrawn on security being given. In Billington's case the money was paid into Court for the purpose of appealing to the Court of Appeal, instead of giving the bond required to be given by the statute, and having served that purpose it was ordered to be repaid.

And in the *Lindsay Petroleum Case*, the money was paid in and, it was agreed that it should stand as a security for the purpose of such appeal in lieu of the security required by the statutes, and having served that purpose it was ordered to be repaid.

I think the money paid in by Mr. Donovan must, on the materials before me, be taken to have been so paid in lieu of the bond required by the statute, and when the decision in appeal was given in his favour the money had served the purpose for which it was paid, and ought to be repaid.

An appeal to the Court of Appeal is a "step in the

cause," R. S. O. ch. 28, sec. 31 ; but there is no such provision in regard to an appeal to the Supreme Court. I must assume that the order of the Court of Appeal is a correct declaration of the rights of the appellant, and the order in appeal plainly contemplates the refunding of the money.

I grant an order for the payment out of this money with costs of this application, and do not think I ought to impose any terms.

In *McLaren v. Caldwell*, 9 P. R. 118, I approved of a similar order made by the Referee.

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## DEMOREST V. THE MIDLAND RAILWAY OF CANADA ET AL.

### *Railway company—Compensation for land taken—Proof of title—Mandamus.*

Under sec. 6 ch. 67, 45 Vic. (C.) the Midland Railway, as constituted by the Act, is the company, that strangers or persons having claims, &c., upon any of the companies incorporated by the Act, should proceed against for the enforcement of their rights.

The owner of land taken by a railway, is entitled to compensation ; and the company must proceed to settle the amount thereof, under R. S. O. ch. 165, sec. 20 ; if they do not the proper course is to apply for a mandamus.

On such applications a formal title in the absence of proof to the contrary, need not be proved ; it is sufficient if the applicant swear that he is the owner of the land taken.

The notice of motion was addressed to the Midland Railway Company, and the Grand Junction Railway Company, and to the Presidents and Directors of each, and asked for relief against all or either.

*Held*, that sec. 17, ch. 52, R. S. O., contemplates the calling upon any party who may be affected by the writ, if issued, to shew cause why it should not issue, and therefore the notice was not objectionable as being in the alternative.

THE applicant Burnham G. G. Demorest, claiming to be the owner of a portion of the south part of farm lot number 12, in the 1st concession of the township of Rawdon, taken possession of by the Grand Junction Railway Company, for the road-way of the company, through the land so owned by the applicant, about the year 1873, caused a notice in writing claiming compensation to be served on the 13th day of October, 1882, on George A. Cox, President of the Midland Railway Company, and upon Thomas Kelso, President of the said Grand Junction Railway Com-



pany, addressed to the said companies, and the said George A. Cox and Thomas Kelso, as Presidents of the said respective companies, as follows :

To The Midland Railway of Canada, and to George A. Cox, president thereof, and to the directors thereof ; and to The Grand Junction Railway Company, and to Thomas Kelso, Esq., its president and to the directors thereof.

You are hereby required, without delay, to proceed under and as directed by "The Railway Act of Ontario," to serve a notice upon Burnham G. G. Demorest, of Stirling, in the County of Hastings, physician, or upon me, as his solicitor in this behalf, containing

(a) A description of the lands taken by The Grand Junction Railway Company, and now in the use, possession, and occupation as a railway track and bed by the said The Midland Railway of Canada, being a part of farm Lot No. 12, in the 1st Concession of Rawdon, in the County of Hastings, and which part so taken and used as aforesaid by the said Railway Companies was owned at the time said Grand Junction Railway Company took possession thereof by the said Burnham G. G. Demorest who still owns a portion of said Lot 12, through which said roadbed runs and divides as aforesaid. Describing them.

(b) A declaration of readiness to pay some certain sum as compensation for such lands or for such damages.

(c) The name of a person to be appointed as arbitrator of the Company if their offer be not accepted, and such notice shall be accompanied by the certificate of a sworn surveyor for Ontario disinterested in the matter and not being the arbitrator named in the notice.

(1) That the land shewn on the map or plan (filed under and as required by said Act) is required for the railway or is within the limits of deviation allowed by said Act.

(2) That he knows the land or the amount of damage likely to arise from the exercise of the powers, and

(3) That the sum so offered is in his opinion a fair compensation for the land and for the damages as aforesaid.



And the said Burnham G. G. Demorest requires these steps taken by said railway companies and persons addressed as aforesaid in order that the amount due and owing him by said railway companies for the lands so taken by said railway companies and now in the use and possession of the said The Midland Railway of Canada may be ascertained and fixed.

And further take notice that the said land so taken from said Burnham G. G. Demorest without his consent has been in the possession of the said Grand Junction Railway Company and the said The Midland Railway of Canada about eight years, and the same was then so taken without a value or amount of compensation having been fixed as to be paid said Burnham G. G. Demorest, nor has it been fixed to this date, although you have been frequently requested so to do, and settle with said Burnham G. G. Demorest therefor, and up to this date compensation therefor still remains unpaid and you have taken no steps to ascertain the same although frequently requested to do so.

And further take notice that the said Burnham G. G. Demorest requires you forthwith to take the necessary steps to ascertain the amount payable to him by the said railway companies, or one of them, for compensation for the part of Lot 12, in the 1st Concession of the Township of Rawdon, in the County of Hastings, and being a portion of the Village of Stirling, entered upon and continuously used by the said The Grand Junction Railway Company at the time of their taking possession (and now used and in possession of the Midland Railway of Canada for the purposes of their railway) and for damages occasioned thereby.

And also take notice, that unless you take at once the necessary steps to ascertain and fix the amount of damages (under and pursuant to the Railway Act of Ontario) to which the said Burnham G. G. Demorest is entitled for such taking and his deprivation of said part, as aforesaid you are requested to do, the said Burnham G. G. Demorest

will be driven to and will ask the Court to compel you to do so by *mandamus*.

Dated Stirling, 12th October, 1882.

BURNHAM G. G. DEMOREST,  
*Per* GEO. A. SKINNER, *his Solicitor*.

The affidavit of the applicant set forth that he was the owner of the land in question: that about nine years ago the Grand Junction Railway Company appropriated to their own use, without his permission, sufficient of his land for the requirements of the company for its railway track, and used the same ever since and fenced the same off from the rest of the applicant's land, for the passing of trains, and that the same at the time of making his affidavit was used by the Midland Railway Company of Canada for its purposes as a railway, and its trains pass over it every week-day, by some arrangement with the Grand Junction Railway Company: that he had through his solicitor caused to be served on the said railway companies and their officers several notices and letters to settle with him for his interest in the land so taken, and for damages caused to him by such appropriation and railway crossing, but that they had not made any offer of compensation therefor: that many times during and extending over the past nine years he had personally requested Thomas Kelso the president at these times of said Grand Junction Railway Company, its secretary D. B. Robertson, and its solicitor John Bell, Q. C., and latterly Bell and Biggar, to compensate him, and the said persons always put him off, and told him not to be in a hurry, that he would be arranged with: that many times Mr. Bell, Q. C., told him he would urge his said claim to be settled, and would interest himself as far as he could, and upon the advice of the said Bell he filed his claim with the secretary of the company, but up to the present nothing has been paid to or offered to him in settlement: that the companies had not nor had either of them taken any of the steps required by section 20 of ch. 165 R. S. O., or of the like section in

ch. 66 C. S. C.: that the railway track runs and is laid, and does not deviate one mile from the line of the railway, or from the place assigned therefor on the map and plan and book of reference upon which the land is shewn, filed pursuant to the said Acts of Parliament.

An affidavit made by Geo. A. Skinner, the applicant's solicitor, shewing the correspondence between him and the different companies, was also filed, and from this correspondence it was clear the land was taken for the purpose of the Grand Junction Railway Company, and that the applicant's title was never disputed or questioned, and the company's contention appeared to be that by an arrangement made with one Bickford & Co., the latter company should pay for the land.

On the 25th of November, 1882, notice of motion on behalf of the applicant was served on the companies, by leaving a copy with the respective presidents, and the said presidents were also at the same time served for themselves with a similar notice, that on Friday the 1st day of December, a motion would be made before the presiding Judge in Chambers, for an order for a writ of *mandamus* to issue out of the Queen's Bench Division, directed to the Midland Railway Company of Canada, and George A. Cox the president thereof, and the directors thereof, and to the Grand Junction Railway Company, and to Thomas Kelso the president thereof, and to the directors thereof, or to one or both of the said railway companies, or to the directors of one or both of said companies, or to either of its said railway companies and its said president, or to such of the said companies' presidents and directors as to the Court or Judge may seem proper, directing the said companies, or one of them, or the said presidents George A. Cox and Thomas Kelso, or one of them, or said directors of said companies, or one set of such directors, or all of said companies, persons and directors; to serve a notice, pursuant to the Railway Act of Ontario, upon the said Burnham G. G. Demorest, or upon his solicitor George A. Skinner of Sterling, containing (*a*) a description of the lands

taken by the Grand Junction Railway Company, and now in the use, possession, and occupation as a railway track, and held by the said Midland Railway Company of Canada being a part of farm lot number 12, in the 1st concession of Rawdon, in the county of Hastings, and which part so taken and used as aforesaid by said railway companies was owned at the time the said Grand Junction Railway Company took possession thereof by the said Burnham G. G. Demorest, who still owns a portion of said lot 12, through which said road bed runs and divides, (describing them) (b), a declaration of readiness to pay some certain sums as compensation for such lands or for such damages (c), the name of a person to be appointed as arbitrator of the company, if their offer be not accepted, such notice to be accompanied by the certificate of a sworn surveyor for Ontario, disinterested in the matter, and not being the arbitrator named in the notice: (1) that the land shewn on the map or plan, filed under and as required by the said Act, is required for the railway, or is within the limits of deviation allowed by said Act: (2) that he knows the land or the amount of damage likely to arise from the exercise of the powers, and that the sum so offered, is in his opinion a fair compensation for the land, and for the damages as aforesaid, or to the above effect; or to take the necessary steps which are particular set forth and prescribed in the said statutes, to ascertain the amount payable to the said Burnham G. G. Demorest by the said companies or one of them, for compensation for his interest in said portion of lot 12 \* \* and for damages occasioned by such entry, occupation and use of said property and occasioned thereby, and to compel the said companies, or one of them, or the said person, or one of them, or said directors, or one set of them, or all or any of said persons, companies or directors, to appoint an arbitrator for such purposes pursuant to the Railway Act of Ontario, or other statutes in that behalf, and for the costs of the application.

On the 15th December, 1882, the motion came on to be heard.



*J. K. Kerr*, Q.C., supported the motion.

*Bethune*, Q.C., shewed cause, and contended that the motion should fail, as it did not appear by any legal proof or evidence that the applicant was the owner of, or had any legal or equitable estate or interest in the land : that the title on this application required to be formally proved, and it was not so proved, and it did not appear even that the applicant was in possession at the time the land was taken as alleged. On this head he referred to *Jones v. The Erie and Niagara R. W. Co. et al.*, 23 Gr. 559, and *Scanlon v. London and Port Stanley R. W. Co.*, 25 C. P. 559. He further contended there was no sufficient or certain demand of any specific act to be done or performed by the companies, or any of them, and what was asked was not now in the power of the companies or any of them to perform : that the application being addressed to several companies, left it uncertain which was required to perform the act or acts required, and it was the duty of the applicant to determine which company ought to do what was required, and not leave it uncertain which he required to perform the act or acts : that the request or demand being in the alternative made it nugatory, and the extraordinary remedy sought could not be granted. He also contended that the demand being signed by a solicitor, and not by the applicant, was insufficient. He filed no affidavit, and did not otherwise dispute the applicants, ownership of the land than by objecting to the proof of title. He contended that the Act, 45 Vic. ch. 67 O., consolidating the Grand Junction Railway with the Midland and other railways, left it uncertain which company should act in the present proceeding, and the applicant should have some other and more appropriate remedy than by *mandamus*, whereby all interests might be protected.

*Kerr*, Q. C., in reply, contended that the demand upon the companies was sufficiently signed and certain : that it was not and is not impossible to perform what is required, which may as well be done now as at the inception of the work, and that the Grand Junction Railway Company,



having taken possession of the land, was not in a better position to avoid following the requirements of the Railway Act than it or the Midland Railway Company would be if they were now requiring to take the land: that calling upon the several companies would in no way relieve the one that ought to make compensation for doing so. As to the proof of title on such applications it was usual to prove title by affidavit merely: *In re Benson et ux. v. Port Hope, Lindsay, and Beaverton R. W. Co.*, 29 U. C. R. 529; and the company would have ample protection, even after award made under the Railway Act

CAMERON, J.—It seems to me clear under sec. 6 of ch. 67 of 45 Vic. O. the Midland Railway Company as constituted under that Act is the company that strangers or persons having dealt with any of the consolidated companies, and having liens or claims against any such companies, must proceed against for the enforcement of their rights. That section is as follows: "The assets of the said several companies hereby consolidated, including any which may be earned by each company up to the time the said agreement takes effect, and against which any lien or claim exists or may exist notwithstanding said consolidation, shall continue liable to satisfy all liens and claims against that company which was originally liable therefor or thereto, and shall be applied in such satisfaction, but no other assets of the companies hereby consolidated shall be applied, nor shall the said assets of one company hereby consolidated be so applied in satisfaction of any lien or claim against the other. Provided that all suits and proceedings to enforce any such lien or claim shall be brought and taken against the company formed by the said consolidation, but only the assets of the company against whom the claim originally existed shall be liable to satisfy any such claim."

Nothing could be more definite and explicit than this, as to the company to be proceeded against, nor the source from which any claim which may be established by the suit or proceeding is to be satisfied. If, therefore, the

applicant is entitled to a *mandamus* on this motion, such *mandamus* must be directed to that company, and not any of the objections taken by Mr. *Bethune* seems to me to disentitle the applicant to have the relief sought.

For the present purpose, and under ch. 52 R. S. O., the proceeding by *mandamus* must be regarded as an ordinary and not an extraordinary proceeding, and one highly remedial in character, to be facilitated rather than hedged round by technical niceties and refinements, that embarrass rather than secure the proper and efficient administration of justice. There can be nothing clearer than that the owner of land taken for the purposes of a railway is entitled to compensation therefor: that by the Railway Act, the *quantum* of compensation if not agreed upon must be fixed and determined by arbitrators: that the company taking the land is to take the initiative in bringing about such arbitration, and if it fails to do so, the appropriate remedy to compel performance of its obligation is *mandamus*. I see no difficulty in the company now serving the applicant with a notice, under sec. 20 of the Railway Act, ch. 165 R. S. O. It is true the lands have been already taken, but they are still required, and the notice will be applicable in all essential particulars, and so the applicant by the demand or notice served has required nothing to be done that it is impossible for the Midland Railway Company representing the Grand Junction Railway's obligations to perform. But it is not essential that all these formalities should be observed, an arbitrator may at once be appointed, but I think it is more in the interest of the company, if they so wish it, to give the notice as required by sec. 20. as they will by so doing have the benefit of sub-sec. 7 as to costs, in the event of the sum that may be offered not being accepted, and afterwards being found on the arbitration to be sufficient. As to the objection that the application is not definite enough in defining which company should perform the duty or obligation required: sec. 17 of ch. 52 R. S. O., clearly contemplates the calling upon any party who may be affected by the writ, if issued, to shew cause

why it should not be issued, and certainly there can be no harm done by such party being called upon alone or in conjunction with others to do what is required, if there is reasonable ground for supposing the duty of performing what is required rests with such party. The objection to the title of the applicant to the land is, I think, under the circumstances of no weight. If in fact he had no title, it would be good cause to shew against the application, and *primâ facie*, he having sworn that he is the owner for the purpose of this application, it must be assumed, in the absence of any denial under oath of his claim, that he has such an interest as entitles him to some compensation. The demand made by the solicitor on behalf of his client, the authority to do so existing and being recognized by the client, constituted a sufficient demand to sustain the application. I think the application must be allowed, with costs to be paid by the Midland Railway Company, both of the application and the writ.

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### DEMOREST V. MIDLAND RAILWAY COMPANY.

#### *Mandamus—Attachment—Sequestration.*

Attachment not sequestration is the proper remedy for disobeying a mandamus. A writ of mandamus was directed to the Midland Railway Company, and was served on the president.

Attachment against the president for disobedience of the writ was refused, because it appeared that he could not by himself and without a majority of the board of directors perform the act required by the writ, and the other directors had not been served; but *Held* that the mandamus was properly directed to the company.

[November 16, 1883.—*Wilson, C. J.*]

A motion for an attachment against the president of the Midland Railway Company for contempt for his disobedience of the writ of *mandamus*, which was directed to the company, commanding the company to serve a notice upon the said Demorest containing a description of the lands taken, and now in the possession of the railway company as a railway track, and a declaration of readiness to pay some certain sum or rent as compensation for such

land, or for such damages, (and the other requisites as provided by the statute in such a case), and for a writ of sequestration against the estate and property of the said President and Company, or one of them, and that they pay the costs of this application.

*Holman*, for the motion.

*A. H. Marsh*, contra.

*Marsh*, admitted right of the applicant to have, the statutory notice served, and agreed that it should be given, and he urged the order should be made to that effect, but without costs.

*Holman*, stated that he had communicated with the solicitor for the applicant, and he was instructed that the directors had not personally been served because the solicitors of the railway had agreed that service upon the president should be considered sufficient. The applicant's solicitor was unwilling to accept offer.

*Marsh*, then argued that the motion could not be sustained, because the Common Law Courts never had the power of sequestration, and the additional power given by the Judicature Act is only to be applied in cases where the Court of Chancery would have granted it before that Act, and the writ of mandamus for the alleged disobedience of which this process was demanded, was wholly a common law writ, and Chancery could not therefore have granted sequestration.

Rule 342, O. J. A., gives the Court power to grant such a writ, but not in a case like the present. The writ of mandamus should be directed to the corporation, or to the select body within the corporation whose duty it is to perform the particular act required to be done, or who have the power to direct or empower it to be done. *High on Extraordinary Legal Remedies* sec. 442; *The Mayor v. Lord*, 9 Wall. 409; *The People ex rel. The Commissioners for the Erection of a Public Market in the City of New York v. The Common Council of the City of New York*, 42 New York Rep. (3 Keyes)



81. To make the writ efficacious it must be served upon such officers of the corporation who have the power, and whose duty it is to execute what is required of them, and against whom an attachment to enforce obedience may issue: *Dillon on Municipal Corporations*, 3rd ed., secs. 872, (701), 875, (704). Here no other officer than the president has been served with the writ, and he cannot alone do the act which is required by the writ to be done.

*Holman* cited, *In Re Goodwin v. Ottawa and Prescott R. W. Co.*, 13 C. P. 254; *Long v. Long*, 6 P. R. 137; *Attorney-General v. Brantford*, 1 Chy. Ch. 26; *Leggo's Practice* 646; *Dundas v. The Hamilton and Milton Road Co.*, 19 Gr. 455; *Dillon on Municipal Corporations*, 2nd ed., p. 810.

WILSON, C. J.—I am satisfied the writ of *mandamus* was properly directed to the corporation, although it may be a particular person or persons within the corporation was or were to do the act required; *Abingdon Case*, Carth. 499; 1 Lord Ray 560; *Pees v. Mayor of Leeds*, 1 Str. 640; *Com. Dig.* "Mandamus," C. 1; *Norris v. The Irish Land Co.* 8 E. & B. 512, referred to in the case of *Goodwin v. Ottawa and Prescott R. W. Co.*, 13 C. P. at p. 261; *Tapping on Mandamus*, 316; *The Queen v. Ledgard*, 1 Q. B. at p. 623.

The *mandamus* was directed to the company only, but the president of the company was also served with it. The corporation is no doubt in default, but such a body cannot be attached: *The Queen v. Ledgard*, 1 Q. B. 616; *Grant on Corporations*, 231; *London v. Lynn*, 1 H. Bl. 209. Those only of the corporate body who act for the company can be attached if they have been served with the writ: *Ibid*, *The King v. The Inhabitants of Wix*, 2 B. & Ad. 197, 203. The affairs of the corporation are managed by a board of directors, who elect a president and if necessary a vice-president.

It is not disputed that on this writ an attachment might go against the individual directors who had been served with the writ, if all the directors, or perhaps if a sufficient



number of them had been served, who would be the majority of the whole number, and would be capable of doing the required act. But it is said an attachment cannot go against the president, as he alone was served, and is quite incapable himself of doing the act required.

If the writ is good against the corporation, it must be because obedience to it can be enforced by the power of the Court from which it issued, and that process is by attachment. As such process cannot go against the body corporate, why should it not go against the individual persons who should do the act? It is admitted that may be done, but it is said not unless they have been respectively and personally served with the writ. Is it necessary they should have been so served, or are they not sufficiently served by the service having been legally made upon the corporation? I am of opinion on principle, and from the general tenor of the cases, and more certainly from *The King v. Edyvean*, 3 T. R. 352, that to bring the parties into contempt and to subject them to attachment they must be served with the writ, and it is not an available proceeding to serve, as in this case, the president of the company, and to claim an attachment against him, unless it be for default in performing an act which he can himself and by himself perform. Here it is plain it is an act which must be done, in the absence of evidence to the contrary, by the majority of the board of directors.

The attachment against the president should therefore not go, and as no other officer was served with the writ no attachment can be granted.

Then as to sequestration, I am of opinion it is not the appropriate remedy. Attachment was the proper form at the common law and it is the remedy expressly by our own mandamus Act.

I do not grant either process as moved for.

I discharge the motion, but without costs.

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## WEBSTER v. LEYS.

*Married women—Next friend—Rules 97 & 494 O. J. A.*

Where a decree was made in June, 1881, two months before the O. J. A. came into force, and an order was made on the 29th October, 1883, staying proceedings until a new next friend was appointed to the married women plaintiffs, who sued in respect of their separate estate.

*Held*, that the order was right, for although Rule 97, O. J. A. says that married women may sue without a next friend in regard to their separate estate, yet R. 494, O. J. A., in effect says they shall not do so where a decree has been obtained before the O. J. A. came into force.

[November 28, 1883.—*Proudfoot, J.*]

AN appeal from an order of the Master in Chambers staying proceedings until a new next friend to the plaintiff a married woman, was appointed.

*Black*, for the plaintiff.

*Kingsford*, contra.

The facts appear in the judgment.

PROUDFOOT, J.—The Master in Chambers made an order on the 29th October, 1883, staying proceedings until a new next friend to the married women, plaintiffs, was appointed instead of a next friend who was insolvent, the new next friend to be liable for the past and future costs of the defendant Leys.

The plaintiffs appeal from this order.

At an earlier stage of the cause I allowed a demurrer to the bill, because the married women sued without a next friend, (28 Gt. 471) and the plaintiffs accepted that as a correct declaration of the law applicable to the case, and amended their bill by appointing a next friend.

The case afterwards came on for hearing on the 4th May, 1881, and a decree was made which bears date the 14th June, 1881.

It is said that the property was converted into personality by the will in 1856, and under the authority of *Lawson v. Laidlaw*, 3 App. R. 77, it became the separate estate of the married women.

But that did not dispense with the necessity of the married women suing by their next friend (1 Dan. Chy. P. 102, 5th ed.)

It was only the Statute of 1872 that had that effect, and it did not apply to property acquired before the statute was passed. In *Shelley v. Goring*, 8 P. R. 36, the property was acquired in 1877.

But I think I must assume that my order upon the demurrer was correct, and that when it was made a next friend was necessary for the prosecution of the suit.

It is then said that under the Judicature Act, R. 97, married women may sue without a next friend, in cases relating to their separate estate.

That statute came into force on the 22nd August, 1881, while the decree in this case was made on the 14th June, 1881: R. 494 provides in respect to pending business in the Court of Chancery, that all causes, with some exceptions that do not apply to this case, shall so far as relates to the form and manner of procedure be continued and concluded in the same manner as they would have been in the Court of Chancery.

I think that disposes of this case. Rule 97 does indeed say that married women may sue without a next friend in regard to their separate estate, but Rule 494 of the same Act in effect says they shall not do so when a decree has been obtained before the Act came into force.

The Master's order was therefore right, and the appeal is dismissed, with costs.

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## MCLAREN V. STEPHENS.

*Action upon appeal bond—Staying proceedings.*

An action against the sureties upon a bond given by the defendants in the action of *McLaren v. Canada Central Ry. Co.*, upon the appeal of the defendants to the Court of Appeal in that cause. The defendants in *McLaren v. Canada Central*, appealed from the Court of Appeal to Her Majesty in Council, and in that appeal security had been given and allowed, including security for the whole amount recovered, and execution had been stayed in consequence.

*Held*, that proceedings must also be stayed in this action.

[November 29, 1883.—*The Master in Chambers.*]

A motion to stay proceedings.

The facts appear in the judgment.

*Clement*, for the plaintiff.

*Holman*, for the defendants.

THE MASTER IN CHAMBERS.—An action has been brought (this action) upon the bond given by the appellants (the defendants) upon the appeal, against the judgment of our Court of Common Pleas to the Court of Appeal.

The judgment of the Court of Appeal affirmed the judgment of the Court of Common Pleas, which was adverse to the defendants, and thereupon the defendants are appealing to Her Majesty in Council. The necessary securities on the latter appeal have been settled and allowed, including security for the whole amount recovered, &c., and execution has been stayed in the original cause, by the order of the Honourable Mr. Justice Burton.

I am now asked to stay this action against the sureties in the bond given upon the appeal to the Court of Appeal.

By the 51st and 52nd sections of the Act, R. S. O. ch. 38, execution shall be stayed in the original cause, under the circumstances of this case, as stated above, and execution has been stayed accordingly, by order. That would seem, to be a useless proceeding, if the whole amount may be at once enforced against the sureties—who can then, no doubt, enforce payment from the principal. That could not be prevented in such a case. It seems to me, therefore

that unless this action be stayed the enactment of the statute is defeated, and that by this indirect method the defendants will be compelled to pay the judgment, notwithstanding the security given, and the order for stay of execution.

I should say, therefore, that I ought to grant this motion, and after thus expressing the ground on which I act, it will be as well to stay proceedings in this action until further order.

### KELEHER V. MCGIBBON.

#### *Entry of Judgment—Interest—Rules 326 & 351 O. J. A.*

In endorsing a writ of execution to levy interest upon the amount of the judgment, the interest is to be computed from the day of pronouncing the judgment, not from the day of the formal entry thereof.  
Rules 326 & 351 O. J. A. are not inconsistent.

[November 30, 1883.—*The Master in Chambers.*]

THE plaintiff claimed interest on his judgment from the day upon which it was pronounced, and the defendant contended that interest should only be allowed from the day of the entry up of judgment. The parties agreed to submit the question to the Master in Chambers.

*Ogden*, for the plaintiff.

*Clement*, for the defendant.

THE MASTER IN CHAMBERS.—I do not see any inconsistency between Rules 326 and 351, O. J. A. This was a judgment given in Court, and by Rule 326, "Where any judgment is pronounced by the Court, or a Judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, and *the judgment shall take effect from that date.*" Then that is the day when judgment is "entered up" under Rule 351, which is,



“Every writ of execution for the recovery of money shall be endorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of six per cent. per annum from the time when the judgment was entered up.” There need be no difficulty in conceiving this idea, for we are all familiar with orders that judgments shall be entered *nunc pro tunc*, which gives the judgment relation to a past day, and that is what is done under this rule when the judgment is in fact entered at a day after the day when judgment was pronounced.

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### FORFAR V. CLIMIE.

#### *Division Court—Jurisdiction—Prohibition.*

“Mr. Thomas Forfar.—Please ship us your old boiler and engine, to be in good shape, to our address, not later than June 7th, 1883, for the sum of \$115 and shafting.—G. Climie & Son.”

*Held*, that the foregoing order did not ascertain the amount due, so as to bring the case within the increased jurisdiction of the Division Courts under 43 Vic. ch. 8, O.

[December 21, 1883.—*Rose, J.*]

THE action was brought on the following order :

MR. THOS. FORFAR.—Please ship us your old boiler and engine, to be in good shape, to our address, not later than June 7, 1883, for the sum of \$115, also shafting.

G. CLIMIE & SON.

The notice of defence raised the question of jurisdiction, but it was not pressed at the trial, which proceeded before a jury, and a verdict for plaintiff for the full amount was rendered. A new trial was applied for, when the want of jurisdiction was pressed, but the new trial was refused, the learned Judge considering that there was

jurisdiction to entertain and try the claim, under the extended Jurisdiction Act of 1880, and that if not there was no jurisdiction to entertain the application for new trial.

The following is the judgment of the County Judge :

SINCLAIR, Co. J.—I am of opinion that this action was properly brought in the Division Court. It is contended that the claim here sued on is conditonal, and therefore not suable under the Division Courts Act 1880.

The writing signed by the defendants is in these words :

“ Mr. Thos. Forfar—Please ship us your old boiler and engine, to be in good shape, to our address, not later than June 7th, 1883, for the sum of \$115, also shafting.

G. CLIMIE & SON.”

The 2nd section of the Division Courts Act of 1880, requires “the amount or original amount of the claim” to be “ascertained by the signature of the defendant.” The case of *Wiltsie v. Ward*, 19 Can. L. J. N. S. 92, was relied on by the defendants’ counsel. But this case is clearly distinguishable from that decision. There “thè amount,” was not ascertained by the signature of the defendant, for evidence had to be given there to determine the amount. Here nothing of the kind was required, and the fact that evidence of the consideration for the promise was given, does not the less bring the case within the statute. In all cases of simple contract debts, except bills of exchange and promissory notes, the most positive and unequivocal promise to pay an amount between \$100 and \$200 would not, if that argument is good, be suable in this Court. The consideration would then have to be proved as here. The *acknowledgment* must not be conditional, and no case goes further. The reason of the thing is all in favour of the plaintiffs contention. The papers signed by the plaintiff, and produced by the defendants taken in connection with that sued on, show a complete contract. I have consulted *Re Widmeyer v. McMahon et al.*, 32 C. P. 187; *Burns v. Rogers*, 11 Can. L. J, N. S. 209.

2. Notice disputing the jurisdiction was put in, but no objection was made to the jurisdiction at the trial, and I inferred that the notice was considered abandoned or withdrawn. I do not think a defendant can take his chance of winning, as was done here, and then turn round and apply for a new trial on the ground of want of jurisdiction. I refer to *Ex parte Butters, re Harrison*, 43 L. T. N. S. 2; *Ex parte Swinbanks, In re Shanks*, L. R. 11 Ch. D. 525. I think too that the defendants virtually consented to the jurisdiction under section 10 of the Act of 1880. It is not necessary that it should be in writing under that section, and the defendants' conduct was stronger than words: see *Sinclair's Division Courts Act*, 1880, p. 27. I am now speaking of this case as triable in *some* Division Court: see *Mead v. Creary*, 32 C. P. 1.

3. If the action is not triable in any Division Court then what was done, the defendants argue, was simply a void proceeding. If so, new trial is not the remedy. A motion for new trial presupposes jurisdiction. If jurisdiction is wanting the case simply stops: *Fair et al. v. McCrow*, 31 U.C.R. 599 and 602; *Hodgson v. Graham*, 26 U.C.R. 127.

4. I think the jury was warranted in coming to the conclusion they did on the evidence given. No objection was made to the way the case was left to the jury. I cannot disturb the verdict as against evidence. The application entirely fails and must be dismissed, with costs

*Staunton* now moved for a writ of prohibition to the clerk of the Division Court of Wentworth, to restrain further proceedings.

*Sadleir*, shewed cause.

ROSE, J.—The learned County Court Judge thought this case distinguishable from *Wiltsie v. Ward*, 19 Can. L. J. N. S. 92 (a), I have been favoured with the full text of that judgment, and find the order in the following terms:

(a) Since reported in 8 A. R. 549.

"Received from Mr. Richard Wiltsie an order from Chauncey Blanchard, ordering me to pay him the sum of \$140, which is accepted on the following conditions. providing he carries out the agreement with me as cheese maker.  
RICHARD WARD."

The words of the statute are: "Claims for the recovery of a debt or money demand, and the amount or balance of which does not exceed \$200, and the amount or original amount of the claim is ascertained by the signature of the defendants or of the person whom as executor or administrator the defendant represents."

The learned Chief Justice of Appeal considers the statute, and expresses his opinion at some length. I extract the following sentence from the latter portion of the judgment: "The writing does not ascertain the amount due, or that ever has been due, but only the amount that might thereafter become due in certain events, in relation to which much evidence *pro* and *con* might be given, and was in fact given in this case."

Applying these words to the order in question, we do not find that it "ascertains the amount due," *i. e.*, at the date of the order, for at that date nothing was due nor "that has been due, but only the amount that might thereafter become due in certain events," *i. e.*, if the plaintiff shipped the old boiler and engine, to the defendants' address, in good shape, not later than June 7th, 1883, also shafting. "as to which much evidence *pro* and *con* might be given, and was probably in fact given in this case."

With every respect for the opinion of the learned Judge of the County Court, I am unable to distinguish the cases, and feel bound to grant the order for the writ.

It seems to me the decision in *Wiltsie v. Ward*, 19 U. C. L. J. N. S. 92 (*a*), is that the class of cases the statute contemplates are such as notes, &c., where the instrument in writing on the face of it imports consideration received, determines the amount then due, and contains a promise

(*a*) Since reported in 8 A. R. 549.

to pay ; where the proof of the signature makes a *prima facie* case ; and not a writing which is merely a conditional promise to pay, conditional on the performance by the plaintiff of what he may never perform, and without the performance of which no liability can arise. To illustrate : "Thirty days after date, I promise to pay John Brown \$200," answers the first description, and plainly comes within the jurisdiction, while "If John Brown within thirty days lends me \$200, I will repay same on demand," answers the second description, and does not come within the jurisdiction.

I think my opinion is in harmony with the decision in *Kinsey v. Roche*, 8 P. R. 516, where Mr. Justice Osler uses the following language : "The claims mentioned in sec. 2 of the Division Courts Act, of 1880, are in my opinion claims upon instruments such as notes or otherwise in which a debt or money demand is acknowledged in favour of the creditor."

As to costs. The question of jurisdiction was raised in the notice of defence, and although not pressed at the trial I do not think from what took place on the motion for new trial or before me that the plaintiff would have withdrawn the case had the point been pressed at the trial ; and I therefore give costs.

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## IN RE JENKINS V. MILLER.

*Prohibition—Division Court—Jurisdiction—Set-off.*

The plaintiff brought his action in a Division Court for \$74.31, his claim being \$156.36, an unascertained amount, as against which he admitted a set-off of \$82.05. At the trial in the Division Court the plaintiff affirmed, and the defendant denied, that there had been an agreement between them to set-off against the plaintiff's claim the value of certain purchases made by the plaintiff from the defendant, and the Judge at the trial found, as a matter of fact, that there had been such an agreement.

*Held*, following *Fleming v. Livingstone*, 6 P. R. 63, and *Dixon v. Snarr*, 6 P. R. 336, that it was a question of fact for the Judge of the Division Court to determine whether or not there was an agreement between the plaintiff and defendant; and the Judge having determined that there was, there was jurisdiction, and a prohibition was refused.

[December 22, 1883.—*Cameron*, J.]

A motion on behalf of a primary debtor for a prohibition to prohibit the Tenth Division Court in the county of York from further proceeding in an action in that Court, which had been begun by the primary creditor by a writ specially indorsed as follows:

To amount of account.....	\$153 30
“ One Table .....	1 30
“ Eight Chairs .....	1 76
	<hr/>
	\$156 36
By purchase.....	82 05
	<hr/>
	\$ 74 31

At an auction sale of a quantity of goods belonging to the primary debtor, purchases were made by the primary creditor, under an agreement made before the sale, that the amount of such purchases should be set off against the indebtedness of the primary debtor, which agreement the latter denied. The primary creditor had made purchases at the sale to the amount of \$82.05, as he alleged, and the auctioneers had permitted him to remove the goods without payment in cash. The auctioneers were garnishees, and had paid into Court the balance of the primary creditor's claim, after deducting \$82.05.

The primary debtor claimed that the amount of the

purchases made by the primary creditor greatly exceeded the amount of the primary creditor's claim, and that there had been collusion between the primary creditor and the auctioneers; and the primary debtor had brought an action against them in the High Court of Justice.

At the trial in the Division Court the presiding Judge found, on the evidence adduced, that there had been the agreement to set off the amount of the purchases as alleged by the primary creditor, and held the Division Court had jurisdiction.

*G. Bell*, for the motion.

*McVittie*, contra, cited *Fleming v. Livingstone*, 6 P. R. 63; *In re Dixon v. Snarr et al.*, 6 P. R., 336.

CAMERON, J.—I am of opinion the motion for prohibition must be dismissed. The case is governed by the authorities cited on the argument of *Fleming v. Livingstone*, 6 P. R. 63, and *In re Dixon v. Snarr*, in the same volume, p. 336. It was a question of fact for the learned Judge in the Division Court to determine whether or not the defendant did in fact agree that the amount of the plaintiff's purchases at the sale should be deducted from the amount of his claim against her, and he has determined that it was. If he has determined correctly, there was unquestionably jurisdiction. But the defendant alleges that she has not been credited with enough, because the goods bought by the plaintiff were largely in excess of the amount credited. Assuming this to be so, if there was in fact the agreement which the learned Judge found, that the purchases should be credited, the amount credited was sufficient to give the Court jurisdiction, and the omission to give credit for the full value of the goods would no more deprive the Court of jurisdiction than the giving credit only for the payment of \$50, when in fact \$100 had been paid, would oust the jurisdiction.

The position of the matter may cause considerable embarrassment to the now plaintiff in the suit brought by the

now defendant against him in the Superior Court, because the defendant not having set up a set-off, or submitted her claim to the jurisdiction of the Division Court, may not be estopped by the judgment of that Court from having her whole case adjudicated upon in her action, of course being limited, as a matter of equity, to any excess she may be able to shew in her claim over the amount credited in the Division Court. But I have nothing to do with that consideration in this application, as the only question before me is, was there jurisdiction in the Division Court to try the plaintiff's claim, and there was if there was the agreement the plaintiff has alleged, to apply the price of the goods bought at the defendant's sale in reduction of the plaintiff's claim.

The contention on behalf of the defendant on the argument, that admitting that the agreement was made it was made before the sale and not after, and there was no ascertainment of the amount by defendant after the sale, and so there was nothing to justify the plaintiff in giving the credit, is not well founded. The defendant, without any agreement on the plaintiff's part, could have set off sufficient of any larger claim she may have had, to cover the plaintiff's claim, and the plaintiff could have given the Court jurisdiction by abandoning his claim in excess of \$100, but could not without the agreement of the defendant to that effect reduce it by allowing to the defendant a set-off she had not claimed, which brings the matter back to the question of fact, was there such an agreement or not. That was a question competent for that Court to deal with upon the evidence; and as there was evidence to support the finding, it is not competent for me to interfere to prohibit the further proceeding in the Division Court.

## IN RE MUNSIE.

*Administration order—Preliminary issue—Jurisdiction of Master—Setting aside will—Personal representative—Executor's liability for chattels given for life and then to remainder-man.*

The jurisdiction in Chambers to grant administration orders, applies only to simple cases of accounts, and the Judge or Master in Chambers, may take the administration accounts in Chambers without referring them to the Master's office. But to all such references Chancery Order 220 applies.

Where on an application for such order, it appears that there is a substantial and preliminary question to be decided, such question should be decided before the reference is ordered; and the Court may limit a time within which the parties may try the issue. But if the issue is not tried, or the order is made in Chambers without first directing such issue, the parties are held to have waived such preliminary question, and cannot raise it in taking the accounts under such order in the Master's Office.

The jurisdiction of the Master's Office is not co-extensive with that of the Court in enquiring into and adjudicating upon the validity of documents; and there is no authority to support any implied or assumed delegation of the functions of the Court to the Master. Nor is there any practice in the Master's Office which allows parties to obtain a reference to the Master so as to evade the ordinary judicial functions of the Court, and then invoke those judicial functions in a tribunal of delegated and subordinate jurisdiction.

The plaintiffs when taking accounts before the Master under the ordinary Chamber order for the administration of personal estate, sought to have it declared that a bequest to R. who was one of the witnesses to the will, was valid.

*Held*, 1. That the Master had no jurisdiction under such order and on oral pleadings to adjudicate upon the validity of the will; 2. That even if there was such jurisdiction, it could not be exercised in the absence of a personal representative of R.'s estate.

*Quære*, whether since *Ryan v. Devereux*, 16 U. C. R. 100, such a bequest would be held to be invalid.

Where a will creates a life estate in chattels, the executor is discharged when he hands over such chattels to the tenant for life. The tenant for life, and not the executor, then becomes liable for them to the person entitled in remainder.

[January 8, 1884—*The Master in Ordinary*.]

A reference on an administration suit.

The facts appear in the judgment.

*Brough*, for plaintiffs.

*D'Alton McCarthy*, Q. C., and *Hoyles*, for defendants.

MR. HODGINS, Q.C., MASTER IN ORDINARY. In this case the Master in Chambers, under General Orders 467-470 (similar to sec. 45 of the Imperial Act 15 & 16 Vic. ch. 86) made the usual order for the administration of the personal estate of the testator William Munsie, who died 26th August, 1854. The will disposes of the personal estate thus: "I further bequeath to my beloved wife, Margaret,

all the household property, all the goods and chattels at present on lot No. 9, said goods and movable property to become the property of my son Robert at his mother's death." The son, Robert Munsie, was one of the witnesses to the will, and it has been urged that by reason thereof the bequest to him is invalid, and that I should report that as to the testator's personal estate, after the death of the tenant for life, the testator died intestate. The testator's widow died in 1874, and his son Robert in 1869.

The plaintiffs are the next of kin of the testator, and the defendants are the personal representatives of James Munsie, the acting executor of William Munsie's will. No personal representative of Robert Munsie's estate, or of Margaret Munsie's estate, is a party to this proceeding.

From the evidence, it appears that after the testator's death, the acting executor, James Munsie, left the widow and Robert Munsie in possession of the farm (which was devised to them for the same estates) and of the testator's goods and chattels; and that Robert Munsie worked the farm for the widow until December, 1858, when he sold the chattels, apparently with the consent of the tenant for life.

When the case was argued, I intimated to the parties that I doubted the jurisdiction of the subordinate tribunal of the Master, under the Chamber order for administration, to declare the will invalid; or, assuming the jurisdiction, whether such a declaration of invalidity could be made in the absence of a personal representative of Robert Munsie's estate.

Although the English and Canadian cases respecting administration proceedings are not quite harmonious on all points, the weight of authority is in favour of the rule that the jurisdiction in Chambers to grant administration orders applies only to simple cases of account.

Such a conclusion seems reasonable, when it is considered that the Judge, or the Master, in Chambers may take the administration accounts in Chambers without referring them to the Master's office.



In *Acaster v. Anderson*, 19 Beav. 161, the usual administration decree had been made in Chambers, although on the application for the order it appeared that a settlement and release had been executed by the plaintiff to the defendant. Subsequently the defendant applied to discharge the order, and, in granting the motion, Sir John Romilly, M. R., said: "It would be impossible to deal with these cases if the Chief Clerk (Master) had authority on summons to set aside a release. The enactment was intended to apply to a simple case of administration, although in the prosecution of the order very difficult questions might arise. But here the point is, whether any account whatever should be taken, and which involves the question whether the release is to be set aside. This is a matter to be decided in Court, and not upon summons in Chambers."

A similar conclusion was arrived at in our Court of Chancery in *Nudel v. Elliott*, 1 Chy. Ch. 326, where Mowat, V. C., refused the usual administration order in a case where it appeared that an award had been made at the instance, it was alleged, of all the legatees (including the plaintiff) and the executor. The plaintiff, a married woman, denied having authorized her husband to refer the matters in dispute to arbitration, and the husband denied that he had any express authority from his wife to do so, and that the award so made was not binding. The Vice Chancellor held that the impeached award could not be declared invalid in that proceeding, and in the absence of other parties who were interested in the award, and that a bill must be filed.

In *Rump v. Greenhill*, 20 Beav. 512; *S. C.* 1 Jur. N. S. 123, it had been found, in taking the accounts under the common administration order, that the Chief Clerk had no jurisdiction to allow certain moneys paid on a compromise of a contest respecting the validity of the testator's will, whereupon a bill was filed to which the defendants demurred. Sir John Romilly, M. R., in giving judgment said: "The form of proceeding on which a summons for

the administration of an estate is issued is this : the plaintiff calls upon the executors to show cause why the common administration decree should not be made. It would be a sufficient cause to show that there are complicated questions involving the rights of various parties arising from the dealings and transactions which the executors had, during the life of the tenant for life ; and affecting also the purchase of an annuity from an annuitant under the will, in order to get rid of it, and avoid the question on the will. Where there is a question which cannot be properly dealt with under an administration summons, the Court does not grant the common administration decree, but says, 'if you will file a bill to bring these questions before the Court within a limited time no administration decree will be granted ; but if that be not done, the Court then makes the usual order for administration, and considers that the defendants have waived the questions.'

In *West v. Laing*, 3 Drew. 331, a question was raised whether certain leaseholds had been specifically bequeathed to the tenant for life, or whether they were part of the general estate and should have been converted. Sir R. T. Kindersley, V. C., said : "If when the application is merely to administer an estate by summons, the Court has reason to see that difficult questions may arise, it will decline to make a decree on summons, and will tell the parties they must file a bill. But if the decree has been made, and accounts have been taken, and the matter then comes before the Judge, he ought to proceed to determine the rights of the parties in respect of the residuary estate, assuming that the proper parties are before him. But, even then, if the Judge sees there are questions depending on controverted facts, or questions partly of fact and partly of law, the Judge ought to say, in the exercise of his discretion, that the matter ought to be made the subject of a suit by bill.

In *Delevante v. Child*, 6 Jur. N. S, 118, under the common order for administration, an attempt was made on

further directions to charge the executors with a breach of trust; but Sir J. Stuart, V. C., decided that if the plaintiff made that charge she should file a bill, as "nothing could be more inconvenient than to try adverse questions upon an administration summons." He added that he could not upon mere oral pleadings at the bar, nor in the absence of the proper parties, decide the questions raised.

*Smith v. Spilsbury*, 1 Dr. & Sm. 157; S. C. 8 W. R. 596, came before Sir J. Stuart, V. C., on a bill filed for the administration of an estate, and it was contended that the relief sought could have been obtained under the ordinary Chamber order; but as the plaintiff sought to charge the personal representative of the testator's executrix with a refusal to account, and as there was also a question on the construction of the will, it was held that it was a proper case for a bill.

In *Partington v. Reynolds*, 4 Drew. 253, Sir R. T. Kindersley, V.C., defined the scope of the usual decree for administration, and stated that under it a plaintiff could not be permitted to show that an executor had been guilty of wilful neglect or default, and that "any such attempt would be instantly and peremptorily rejected." But he added, that if, in investigating the accounts under the usual decree, it was discovered that the executor had been guilty of wilful default, or other misconduct, the plaintiff might, with the leave of the Court, file a supplemental bill adapted to the case.

The cases of *Blakely v. Blakely*, 1 Jur. N. S. 368, and *Lanning v. Gee*, 10 Ch. D. 715, are to the same effect; and the latter case also decides that the practice in these administration cases has not been altered by the Judicature Act.

The decisions in our Court on this latter point have not been uniform. In *Harrison v. McGlashan*, 7 Gr. 531, Esten, V. C., held that a direction to charge executors with wilful default could not be inserted in the usual administration order, and that to obtain such a direction a bill must be filed. *Re Babcock*, 8 Gr. 499, a decision of Spragge, V. C., is to the same effect; and *Haywood v. Sieveright*, 8 P. R.

79, by the same learned Judge, when Chancellor, appears to have been decided on the same principle.

But the full Court, in the case of *Re Allan*, 9 P. R. 277, decided the other way. Boyd, C., in giving judgment, stated that *Harrison v. McGlashan*, 6 Gr. 531, had long been superseded in practice by a current of contrary decisions, beginning with *Carpenter v. Wood*, 10 Gr. 354, and that in all references to the Master, General Order 220, applied, and that by the terms of the administration order, in form No. 171 to the Judicature Act, everything is to be done necessary for the winding up the estate, and for the adjustment of the rights of all parties interested therein. See also *Re Wilson*, 9 P. R. 89.

The cases expressly overruled in this judgment are those which had decided that wilful default could not be enquired into under the usual Chamber order for administration.

In *Barry v. Brazil*, 1 Chy. Ch. 248, Spragge, V. C., on a motion for the Chamber order, refused to direct an enquiry as to moneys expended by the executrix for certain improvements to the real estate, and for the maintenance of the children of the testator. Vankoughnet, C., apparently followed this as to the maintenance of the children, in *Fielder v. O'Hara*, 2 Chy. Ch. 255, but intimated that the Master might report the facts as to such maintenance as special circumstances. In *Stewart v. Fletcher*, 16 Gr. 235, and 18 Gr. 21, Mowat, V. C., appeared to sanction a different practice.

Where a plaintiff claimed to be a creditor of the testator under a breach of covenant, in respect of which he alleged fraud in the testator, in order to take the case out of the Statute of Limitations, Spragge, V. C., held that in such a case a bill was proper, and that the questions raised could not be properly discussed without pleadings and upon affidavit evidence: *Cameron v. McDonald*, 2 Chy. Ch. 29. And in *Re Calton*, 8 P. R. 542, Proudfoot, J., refused the usual administration order, where the plaintiff's claim against the estate was one arising out of a contract of suretyship; but in *Re Allan*, 9 P. R. 297, Boyd, C., stated



that the learned Judge who decided *Re Calton* refused to give effect to that decision in *Re Allan*.

In *Groom v. Darlington*, 9 P. R. 298, on an application for the usual order by a person claiming to be a creditor of the testator, by reason of his support and maintenance of the testator's wife, Boyd, C., dismissed the motion, and held that such a claim must be supported by *viva voce*, not affidavit, evidence.

Reference may also be had to the following cases under the English Common Law Procedure and Judicature Acts: *Clow v. Harper*, 3 Ex. D. 198; *Rawcliffe v. Leigh*, 3 Ch. D. 292; and *Leigh v. Brooks*, 5 Ch. D. 592, which shew that ordinary questions of account may be referred to an official referee; but that where there is a preliminary question to be decided before any account can arise, the Court has no power to refer until such question is decided.

The validity of the will in this case was a substantial and preliminary question to be decided by the Court before a reference could be ordered; and as there is no delegation of the functions of the Court to the Master in the order before me, (as some decrees apparently do), I know of no practice which allows parties to obtain a reference to the Master, so as to evade the ordinary judicial functions of the Court, and then invoke those judicial functions in a tribunal of delegated and subordinate jurisdiction. The affidavits which were before the Master in Chambers on the application for this order stated this bequest of the personal estate to Robert Munsie, and shewed that he was one of the witnesses to the will. The practice of the Court on such a state of facts is shown in the cases above referred to.

It must be assumed that the learned Master in Chambers, in accordance with the rule laid down in *Rump v. Greenhill*, 28 Beav. 512, gave the parties the option to commence an action to test the validity of the will; but whether they had the option or not, I must rule that they have waived the question, and cannot now raise it. I have no jurisdiction to assume the functions of the Court



and on oral pleading decide upon the validity of the testator's will so far as this bequest to Robert Munsie is concerned. The impropriety of assuming the jurisdiction of the Master under a reference to be co-extensive with that of the Court in enquiring into and deciding upon the validity of documents was pointed out by Strong, J., in *Bickford v. Grand Junction R. W. Co.*, 1 S. C. Can. 726 ; and his judgment shows that there is no authority to support any such implied or assumed delegation of the functions of the Court to the Master ; and that such a question as the invalidity of a deed should be raised by the pleadings and adjudicated upon by the Court on the hearing of the cause.

But there is another answer to the plaintiffs' contention. It is evident that Robert Munsie obtained the proceeds of the testator's personal estate during the lifetime of the tenant for life. Had there been no conversion, the chattels on the death of the tenant for life would have vested in, and would have been rightfully claimed by, the personal representative of Robert Munsie's estate. The executor of William Munsie's estate discharged himself of liability in respect of these chattels when he complied with the directions of the will, and handed them over to the tenant for life. The will did not vest them in him as trustee, and the intention of the testator as shown in his will was that his widow should enjoy them in *specie*. The chattels and farm stock were not things to which the doctrine *quæ ipso usu consumuntur* would apply : *Groves v. Wright*, 2 K. & J. 347 ; and the executor was not bound therefore to convert them.

A tenant for life of chattels, bequeathed as these were, is not liable for them to the executor, but to the person entitled in remainder.

In *Conduit v. Soame*, 1 Coll. 285, where a testator directed his gold medal and diamond and gold rings and plate to be kept as heir looms, and bequeathed them to his grandson, Knight Bruce, V.C., made an order (afterwards varied as to the security) directing two inventories of the

articles to be made, one to be kept by the tenant for life and the other to be deposited with the Master for the benefit of the persons interested in them.

*Stanning v. Style*, 3 P. Wms. 334, and *Locke v. Bennett*, 1 Atk. 470, show that one of such inventories is intended for the benefit of the person in remainder, and may be delivered to him instead of being deposited with the Master.

As intimated in *Groves v. Wright*, 2 K. & J. 347, there may be a trust or liability in the tenant for life for the benefit of the person in remainder; but there is no trust here; and I can find no case to warrant me in holding that the title of an executor to chattels, bequeathed as these were, revives on the death of the tenant for life; or that such executor is to be responsible for them to the person entitled in remainder.

The validity of the bequest to Robert Munsie being a question in which his estate is interested, I must hold that even if there was a jurisdiction in the Master to adjudicate upon that issue, it can only be exercised in the presence of a personal representative of the estate: See *Humphries v. Humphries*, 3 P. Wms. 349; *Bowen v. Farlie*, 2 Mer. 101; *Cary v. Hills*, L. R. 15 Eq. 79; *Rowsell v. Morris*, L. R. 17 Eq. 20; *Re Calton*, 8 Pr. R. 542, and *Re Kirkpatrick*, ante p. 4.

It is not necessary to decide, in the absence of such personal representative, whether, under an order for the administration of the personal estate only of a testator, the doctrine in *Brett v. Brett*, 3 Add. 210; *Emanuel v. Constable*, 3 Russ. 436, and *Foster v. Banbury*, 3 Sim. 40, would be held to apply to a bequest like this in a will disposing of real as well as personal estate. Such a conclusion may be found to be warranted by the judgment of Draper, C. J., in *Ryan v. Devereux*, 26 U. C. R. 100, where he held that a legacy to the wife of one of the witnesses to a will of real and personal estate was not void, although the husband was, by reason thereof, not a "credible witness" within the language of the Statute of Frauds.

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## GRAND JUNCTION RAILWAY V. COUNTY OF PETERBORO'.

*Staying proceedings in action—Costs of former proceeding.*

In 1879, the Grand Junction Railway obtained from the Court of Queen's Bench a rule for a mandamus to enforce the delivery of bonds by the defendants to the amount of \$75,000, pursuant to a by-law of the defendants to aid in the construction of the plaintiff's road. On appeal to the Court of Appeal this rule was discharged, and on appeal to the Supreme Court of Canada, the Court of Appeal's judgment was affirmed, with costs against the plaintiffs. Since then the road has been completed, but the costs of the above proceedings have not been paid. This present action is brought in the name of the Grand Junction Railway and the Midland Railway to recover the aforesaid sum of \$75,000 in money.

Upon motion to stay all proceedings in this action till the costs of the former proceedings shall have been paid :

*Held*, notwithstanding that new circumstances having arisen, and the proceeding not being the same as the first proceeding nor grounded upon exactly the same facts, and notwithstanding that the Midland Railway Company are now joined as plaintiffs, the attempt to proceed in this action without first paying the costs of the former action is vexatious, and the order asked for must be made : following *Cobbett v Warner*, L. R. 2 Q. B. 108.

[September 10, 1883.—*The Master in Chambers*.]

IN 1879 the Grand Junction Railway obtained from the Court of Queen's Bench a rule for a mandamus to enforce the delivery of bonds by the defendants to the amount of \$75,000 pursuant to a by-law of the defendants to aid in the construction of the plaintiffs' road.

On appeal to the Court of Appeal this rule was discharged, and on appeal to the Supreme Court of Canada the Court of Appeal's judgment was affirmed, with costs against the plaintiffs.

Since then the road has been completed, but the costs of the above proceeding have not been paid.

This present action is brought in the name of the Grand Junction Railway and the Midland Railway to recover the aforesaid sum of \$75,000 in money.

This was a motion to stay all proceedings in this action till the costs of the former proceeding shall have been paid.

*Marsh*, for the defendants, cited *Cobbett v. Warner*, L. R. 2 Q. B. 108 ; *Cannot v. Morgan*, L. R. 1 Chy. D. 1 ; *Dauvillier v. Myers*, L. R. 17 Chy. D. 346 ; *Foley v. Smith*, 12 Beav. 154 ; *Davey v. Durrant*, 24 Beav. 411 ; *Davey v.*

*Durrant*, 2 DeGex & Jones, 506; re *Grand Junction Railway v. County of Peterborough*, 6 App. R. 339, Arch. Prac. 13th ed. 1105, Daniell's Chy. Prac. 5th ed. 696 and 697.

*McPhillips*, for the plaintiffs' cited *Bell v. Cuff*, 4 P. R. 155; *Danvers v. Morgan*, 17 C. B. 533; *Davis v. Weller*, 5 P. R. 150; *Wade v. Simson*, 1 C. B. 610; *Guest v. Warren*, 9 Ex. 379.

THE MASTER IN CHAMBERS.—It certainly by no means follows as a matter of course that a plaintiff's cause is to be stayed until payment of costs by the plaintiffs of a former proceeding for the same cause of action; where judgment had gone against the plaintiffs, there must be something in the nature of vexation in the plaintiffs' conduct to enable the defendant to compel the plaintiffs to pay the costs of the first proceeding before going on with a second action. But the Court no doubt will prevent a party from being harassed by a second proceeding until payment of the costs of the first litigation where justice requires it.

The defendants here shew that in 1879 the plaintiffs proceeded to enforce from the defendants the delivery of bonds to \$75,000 pursuant to a by-law of the defendants, to aid in the construction of the plaintiffs' road. The plaintiffs succeeded in getting a rule for a mandamus in that proceeding in the Queen's Bench for delivery of the bonds. The defendants thereupon appealed to the Court of Appeal, and the rule for mandamus was discharged, and the case was carried to the Supreme Court, and that Court affirmed the judgment of the Court of Appeal. These latter judgments were with costs against the plaintiffs, so that that litigation was very authoritatively decided against the plaintiffs. Since then the road has been completed, and now, the present proceeding is necessarily, or at any rate is in a different form—the same \$75,000 is sought—but this action is brought for that sum in money. Of course the costs of the defendants in the first proceeding are considerable.



There are cases which would tend to the conclusion that here payment of the costs of the first proceeding should not be made a condition to the plaintiffs proceeding in their action, as somewhat new circumstances have arisen, and the proceeding is not in form the same as the first proceeding, nor grounded upon exactly the same facts. I nevertheless think that I ought to grant this motion. The defendants have not been able to levy the costs—whether there is any possibility of enforcing payment of them, I do not know—certainly the defendants would find difficulties in an attempt to enforce it, which the legislation of last session would not help them in. I refer to the case of *Cobbett v. Warner*, L. R. 2 Q. B. 108, as warranting the opinion which I entertain, and as it seems to me putting the law upon its proper footing.

What upon a general view is justice in this case? The plaintiffs have failed, and have had a very authoritative decision against them, and that decision really applies as forcibly to their claim in this action as to their claim in the first proceeding. It is true that the judgment of the Supreme Court was not upon the same grounds as the judgment of the Court of Appeal, but it seems to me that the opinion of a majority of the Supreme Court, to be gathered from the judgments delivered, do not expressly dissent from the reasons given for the judgment of the Court of Appeal, and are as conclusive against the plaintiffs in the present action as in the first one, and the difference of form in the proceeding, the case in L. R. 2 Q. B. 108, shews is for this purpose no real difference, neither does the Midland Railway being a party here make any difference, they are asserting the rights of the Grand Junction, by virtue of the Act of last Session. I think that the attempt to proceed in this action without first paying the costs of the former proceeding is under the circumstances vexatious on the part of the plaintiffs.

So that I grant an order staying the proceedings by the plaintiffs in this suit, until payment to the defendants of their costs of the former proceeding mentioned in the affidavit of Mr. Edwards, with costs of this motion.



## DARLING V. COLLATTON.

*Interpleader—Sheriff.*

The sheriff seized the goods in question on the 31st day of January, 1883, and on the 1st of February was notified of a claim by an assignee of the judgment debtor, (the assignee being an officer employed by the sheriff) and on the same day the plaintiff's solicitors directed him to sell. The sale took place on the 12th of February, and on the 13th of February the sheriff received the money arising therefrom. On the 26th of February, the sheriff informed the plaintiff's solicitors that the solicitors for the assignee forbade him to pay over the proceeds, and on the 2nd of March the plaintiff received a notice from the assignee's solicitors, that they were instructed to sue him. On the 5th of March notice was given of the application for an interpleader order. The sheriff retained in his hands the proceeds of the sale, and his affidavit, filed on the interpleader application, referred to a conversation which he had had with the claimant's solicitor, in which the latter told him that the claimant did not propose to claim the goods, or interfere with their sale, but would contest the right of the plaintiff to the money arising from the sale, which was to remain in the sheriff's hands. The sheriff also swore that he related what the claimant's solicitors had said to the plaintiff's solicitor. The sheriff's excuse for his delay from the 13th of February to the 5th of March, was that he did not understand that it was his duty to take the initiative.

*Held*, that the sheriff sold with the consent of both parties and did not therefore improperly exercise his own discretion so that the contest properly arose as to the proceeds of the sale.

*Held*, that the delay from the 13th February to the 5th March, no opportunity of trial being lost, was not unreasonable.

*Held*, that the fact of the claimant being an officer in the employment of the sheriff, made no difference.

*Per Boyd, C.*, The disposition of the Court is to be more liberal in relieving the sheriff now than formerly.

[March 24, 1883—*Mr. Winchester, sitting for the Master in Chambers.*]

[April 6, 1883—*Proudfoot J.*]

[September 14, 1883—*The Chancery Divisional Court.*]

## AN interpleader matter.

The sheriff seized the goods in question on the 31st of January, and on the 1st of February was notified of a claim by an assignee of the judgment debtor, the assignee being an officer employed by the sheriff, and on the same day the plaintiff's solicitors directed him to sell. The sale took place on the 12th February, and on the 13th February the sheriff received the money derived therefrom.

On the 26th February, the sheriff informed the plaintiff's solicitors that the solicitors for the assignees forbade him to pay over the proceeds, and on the 2nd March, the sheriff received a notice from the assignee's solicitors that they were instructed to sue him.

On the 5th March notice was given of the application for an interpleader order. The sheriff retained in his hands the proceeds of the sale, and in his affidavit filed on the interpleader, referred to a conversation which he had with the claimant's solicitor, in which the latter told him that the claimant did not propose to claim the goods or interfere with their sale, but would contest the right of the plaintiff to the money derived from the sale which was to remain in the sheriff's hands. The sheriff also swore that he related what the claimant's solicitor had said to the plaintiff's solicitor. The sheriff's excuse for his delay from the 13th February to the 5th March was, that he did not understand that it was his duty to take the initiative.

*Clement*, for the sheriff, (appellant.)

*Hoyles*, for the claimant.

*J. A. Patterson*, for the execution creditor.

An interpleader order was made by Mr. Winchester, sitting for the Master in Chambers.

The sheriff appealed, and the appeal was argued by the same counsel, on April 6th, 1883.

*Cook v. Allen*, 2 Dowl. P. C. 11; *Thompson v. Ward*, 1 Pr. R. 269; *Miller v. Nolan*, 1 Can. L. J. N. S. 327; *Boswell v. Pettigrew*, 7 Pr. R. 393; *Ostler v. Bower*, 4 Dowl. P. C. 605, were referred to.

PROUDFOOT, J.—The sheriff's excuse for the delay is that he did not understand it was his duty to take the initiative.

The claimant was, at the time of the seizure, employed in the sheriff's office.

The order is objected to because the sheriff had delayed unreasonably,—that he had exercised a discretion,—and that the claimant was an officer in his employment.

It was objected to the English cases cited that they proceeded on the ground of the loss of a term. But in *Thompson v. Ward*, 1 Pr. R. 269, a delay of about six weeks was held

to bar the sheriff's right to an interpleader, though it does not appear that a trial was lost. In *Miller v. Nolan*, 1 Can. L. J. N. S. 327, the notice of claim was given to the sheriff on the 30th June, he sold part of the goods on the 5th July, and applied for an interpleader on the 3rd August. Here it is clear that no trial could have been lost, but the application was refused as too late. I do not see that the plaintiff's notice directing the sheriff to sell should make any difference. Upon receiving that direction he had it in his power at once to interplead. He does not choose to do so, but acts upon the writ, or upon the notice. If he acted upon the notice, then, with full knowledge of the claim, he chose to proceed to a sale, he exercised a discretion in the matter without asking the security of an interpleader issue.

*Boswell v. Pettigrew*, 7 Pr. R. 393, seems to me to apply to this case. There the sheriff seized on the 23rd October, 1877, and on the 29th October received a letter signed by the execution creditor and by the solicitor of the T. & L. Co., who had distrained on the goods, agreeing that the sheriff should sell the property and hold the proceeds until it had been decided which of them was entitled to them. The sheriff sold, on the 6th and 10th days of November, and prior execution creditors claimed the proceeds, and on the 5th July applied for an interpleader order. Blake, V. C., says: "Apart from the question of delay, which presents a formidable difficulty in the way of the Court aiding the sheriff in this application, the arrangement entered into between the sheriff and the solicitors for the Trust and Loan Co. and Boswell, precludes the Court from making an order to interplead in favour of the plaintiff. Two passages in the judgment of Wilde, C. J., in *Crump v. Day*, 4 C. B. 764, present in few words, the law on the subject: 'To have the benefit of the course which is opened to him by the statute, it is essential that he (the sheriff) should come personally to the Court, without exercising any discretion of his own;' And again: 'In considering this question, it is not our duty to inquire whether or not the

execution creditor has been in reality prejudiced by the sheriff's neglect.' "

In the present case the sheriff says in his affidavit that shortly after the writ was acted upon by him he saw the solicitor for the assignee, who informed him that he did not purpose claiming the goods seized, or interfering with the sale, but that he would fight over the money which was to remain in his hands. The sheriff then sold the goods. This presents a not more favourable case for the sheriff than *Boswell v. Pettigrew*, 7 P. R. 393. In both he sold without the consent of the competing claimants, for the plaintiff's solicitor says he was informed that the assignees' claim had been withdrawn, and there was, therefore, no common consent to a sale and to fight over the proceeds; in neither was there any loss of a trial. In both, therefore, the same rule should apply, that if the sheriff desire to take advantage of the statute he must come promptly, and without using any discretion of his own.

I do not proceed upon the ground of the claimant being an officer in the sheriff's employment, though that seems to me also to present a difficulty not removed by the fact that the English cases referred to an under-sheriff, who is in a different position to the present claimant.

I think the order should be reversed.

The case was reheard at the instance of the sheriff before the Divisional Court, and argued by the same counsel, on September 11th, 1883.

FERGUSON, J.—Re-hearing of a decision of Mr. Justice Proudfoot upon an appeal from an interpleader order made on the 24th day of March, 1883, by Mr. Winchester, sitting for the Master in Chambers, upon the application of the sheriff of the County of Welland, whereby the interpleader order and all proceedings had thereunder were set aside.

The claimant is the assignee of the execution debtor, to whom an assignment for the benefit of creditors was made.

The seizure by the sheriff took place on the 31st day of January, 1883. The claimant gave his notice to the sheriff on or about the 1st day of February, 1883, claiming the goods, and the plaintiffs' solicitors, by letter bearing date the same day, directed the sheriff to sell the goods. Shortly after this an interview took place between the sheriff and the solicitor who was acting for the claimant and the creditors, whose trustee he was, in which the solicitor informed the sheriff that he did not propose claiming the goods or interfering with the sale thereof, but that they (meaning the claimant and the creditors, whose trustee he was) would fight over the money arising upon the sale, which was to remain in the hands of the sheriff. It is stated in one of the affidavits made by the sheriff, and used upon the application for the interpleader order, that he related to the plaintiff's solicitor what passed at this interview, and what the claimant's solicitor had said. The plaintiff's solicitors, in a letter to the sheriff, dated the 28th of February, refer to this, stating what they say passed between the sheriff and the writer of the letter, in a different way, namely, that the sheriff had informed him in Toronto that the claim of the claimant had been abandoned by his solicitors, but the positive affidavit of the sheriff must be recognized in preference to the statement in the letter.

The sale of the goods by the sheriff took place on the 12th day of February, and on the following day he received the purchase money, some \$375. This money the sheriff retained in his hands, and in his affidavit he says that his reason for not sooner taking action in regard to it was, that from the conversation with the claimant's solicitor, before referred to, and his having told the plaintiff's solicitor of it, he thought that proceedings would be had between the plaintiff and the creditors represented by the claimant without any intervention on his part, and that it was not till after he had received from the plaintiff's solicitors a letter, dated the 28th day of February, in answer to his communication to them, advising them of the claimant's solicitors having forbidden him to pay over



the money, stating, amongst other things, that they (the plaintiff's solicitors) must have the matter settled at once, and after consulting with his own solicitor, that he learned that his proper course, under all the circumstances, was to apply for an interpleader order; and he says in the same affidavit that the delay in making the application arose solely from these causes, and the affidavit on which the motion for the interpleader order was made was sworn on the 2nd March, and the motion was made on the 5th day of March, some twenty days after the day on which the sheriff had received the proceeds of the sale.

It does not appear that the plaintiff's solicitors, upon being informed by the sheriff of the course adopted by the solicitor for the claimant, or at any time afterwards before the sale, in any way changed their instructions to the sheriff, and, as I understand the evidence, I think it fairly shows that both the claimant and the plaintiff were willing and desirous that the goods should be sold by the sheriff, and that their contention, if any, should be in regard to the proceeds of the sale in his hands, the sheriff believing (erroneously perhaps) that the proceedings in the contention, if any, would be between the claimant and the plaintiff without any intervention on his part.

There were not, so far as is shown; and I apprehend the fact is, that there were not any other writs in the hands of the sheriff against these goods either prior to or subsequent to the plaintiff's, and in this respect the case differs materially, I think, from the case, *Boswell v. Pettigrew*, 7 Pr. R. 393, for, in that case, the existence of two writs in the sheriff's hands prior to that of the plaintiff seems to have been considered as an important fact.

When all the circumstances are considered, I think it appears that the delay of the sheriff in making this application has been fairly accounted for, and I cannot see that he did so exercise his own discretion in the matter as to be deprived of the benefit of the course open to him under the statute. I do not see that the fact of the claimant being an employee in the sheriff's office can, under the

circumstances, make any difference in the case; and, after having perused all the cases that were referred to on the argument, and some others to which attention has been called by the Chancellor (amongst the rest the language of Baron Alderson in *Winter v. Bartholomew*, 11 Ex. 705, quoted by Chief Justice Hagarty in *Booth v. The Preston and Berlin R. W. Co.*, 3 Pr. R. p. 93). I am of the opinion that the interpleader order was properly made, and that the order setting it aside should be reversed. The execution creditor should pay the sheriff his costs of this appeal, and of the appeal from the interpleader order. The other costs of appeals reserved, to be disposed of with the costs reserved in the interpleader order.

BOYD, C.—The proper conclusion, from the affidavits and evidence, is, that the sheriff sold the goods with the assent of both parties, so that the contest properly arises as to the proceeds which came to his hands on the day after the sale, *i. e.* 13th February. He applies to interplead on the 5th March—no unreasonable delay, and no trial being lost. *Booth v. The Preston and Berlin R. W. Co.*, 3 P. R. 90, goes to uphold the original Chambers order, and I do not think it should have been reversed on appeal. (See also *Hammar v. Cowan*, 23 U. C. R. 479). The disposition of the Court is to be more liberal in relieving the sheriff now than in the cases which are cited from *Dowling's Reports*. See *Holt v. Frost*, 3 Ex. N.S. 821. The original order should be restored, and the costs of these appeals as to the sheriff be paid by the execution creditor, and other costs reserved to be disposed of when the issue is decided.

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## MERCHANTS BANK V. HERSON.

*Interpleader—Issues.*

Upon an interpleader application by the sheriff of York there were two execution creditors, viz., the Merchants Bank of Canada and one James Walsh, and three claimants, viz., one Clarkson, the assignee of the execution debtor, for the general benefit of creditors, the Imperial Bank of Canada, and the Standard Bank of Canada, both claiming under warehouse receipts. The Master in Chambers directed the trial of four issues, viz., (1) The Merchants Bank and Clarkson, plaintiffs, against the Imperial Bank, defendants; (2) the Standard Bank, plaintiffs, against the Merchants Bank and Clarkson, defendants; (3) the Standard Bank, plaintiffs, against the Imperial Bank, defendants; (4) the Merchants' Bank, plaintiffs, against James Walsh, defendant, (as to priority of execution).

WILSON, C. J., varied the order of the Master by substituting for the above first three issues a single issue, viz., the Merchants Bank plaintiff v. the Imperial Bank, Standard Bank and Clarkson, defendants.

[October 12, 1883.—*Wilson, C. J.*]

ON the 27th of September, 1883, the Master in Chambers made the following order: "that the parties proceed to the trial of four issues—in the first of which issues the Merchants Bank of Canada and E. R. C. Clarkson, should be plaintiffs, and the Imperial Bank of Canada should be defendants, and the question to be tried should be whether at the time of the seizure by the sheriff the hams and bacon in question were, or any part thereof, was the property of the Imperial Bank of Canada as against the execution creditors the Merchants Bank of Canada and the said E. R. C. Clarkson.

In the second of which issues the said claimants, the Standard Bank of Canada, shall be plaintiffs and the execution creditors the Merchants Bank of Canada and the said E. R. C. Clarkson, shall be joint defendants and the question &c., should be whether &c., was the property of the Standard Bank of Canada as against the execution creditors, the Merchants Bank of Canada and the said E. R. C. Clarkson. In the third of which issues, the claimants, the Standard Bank of Canada shall be plaintiffs, and the Imperial Bank of Canada shall be defendants, and the question &c., shall be whether &c., was the property of the Standard Bank as against the Imperial Bank of Canada; and in the fourth

of such issues, the Merchants Bank of Canada shall be plaintiffs and the execution creditor, James Walsh shall be defendant, and the question &c., shall be whether the writs of execution issued by the Merchants Bank are or either of them is entitled to priority over the execution issued by the said James Walsh." The notice of motion served by way of appeal from the order of the Master in Chambers is at the instance of the Imperial Bank of Canada, and states that application will be made for an order rescinding and setting aside the interpleader order and dismissing the application of the sheriff for the said order, and directing the Merchants Bank of Canada to pay to the Imperial Bank of Canada their costs of the motion on the grounds :

1. That the execution creditors, the Merchants Bank of Canada, admitted their execution did not bind the goods in question as against the claimant, E. R. C. Clarkson. The seizure under their said execution would not therefore support the interpleader order, and the said execution creditors, the Merchants Bank of Canada, should have been barred.

2. No issue can properly be directed as between the respective claimants after the execution creditors are barred, they should be left to the remedies they may have without the intervention of the Sheriff.

3. The course taken by the Merchants Bank of Canada in contesting the title of the other claimants for the purpose of handing over the proceeds of the goods to the claimant E. R. C. Clarkson as against whom the execution of the said Merchants Bank of Canada has been waived is collusive and fraudulent and is done to prevent the title between claimants the Imperial Bank of Canada and the said E. R. C. Clarkson in the replevin suit now pending between them in respect of the same property from being determined on the merits.

4. And the order is unnecessary as the contest between the Imperial Bank and Clarkson with respect to the said property could and would have been properly determined in the replevin suit, or why the order should not be

amended by striking out the name of Clarkson from the part of the said issues ordered to be tried as aforesaid on the 28th September, 1883.

*Shepley*, for the Imperial Bank, supported the motion.

The claims are as follows: The Imperial Bank claims by virtue of a warehouse receipt given by Herson the debtor. Herson made an assignment for the benefit of his creditors to Clarkson; the Merchants Bank are execution creditors. The Standard Bank are not execution creditors, what their claim is is not material to consider; they assent to the order of the Master in Chambers standing.

*Rose*, Q. C., appeared for Clarkson.

*Rae*, for the Merchants Bank.

*A. H. Marsh*, for the Standard Bank, and *Aylesworth*, for the sheriff.

The facts appear in the judgment.

WILSON, C. J.—The purpose of granting an interpleader at the instance of the sheriff is to afford him relief and protection in the execution of process against goods and chattels, according to the preamble of the Act 7 Vic. ch. 30, sec. vi.

If the execution creditor's claim is removed there is no further reason for the suit. The objection made is, that Clarkson the assignee for the benefit of creditors is made a co-plaintiff with the execution creditors, the Merchants Bank; and the Imperial Bank as the defendants are required to contest the right both of the execution creditors, and of the assignee for the benefit of creditors, while the assignee as well as the Merchants Bank are claimants against the execution—and so standing in the same light towards the execution creditors. And the Imperial Bank are compelled to treat the two plaintiffs as acting under the one interest, when in fact their interests are antagonistic—and the Imperial Bank are subjected to have a judgment entered against them at the suit of the assignee for creditors,



although the said bank may recover a judgment against the Merchants Bank.

I know of no instance in which a claimant against the execution creditor is joined with him in his interpleader suit.

If the claimant opposed to the execution creditor succeeds against him there should be an end to his interpleader, for the sheriff if he still has the goods or has to make a return to the execution knows how to act.

It is said the Merchants Bank are willing to waive their execution in favour of Clarkson the assignee, but that they will set it up against all the other claimants, and so it is said the Merchants Bank and Clarkson are virtually asserting the same right. That is not so, Clarkson is a party to this proceeding by virtue of his claim being adverse to the execution creditors, and he has no place in that action unless he maintain that adverse claim.

If the Merchants Bank waive their claim as against Clarkson, they should be barred and further proceedings will be unnecessary. The different claimants may then settle their rights as they may be advised among themselves. If there was money in Court and the execution creditor failed, the Court would have to determine the rights of the different claimants before it was paid out, but not I think properly in this action. But the money is not in Court.

If the Merchants Bank are the only plaintiffs and the Imperial Bank the only defendants, the Merchants Bank as execution creditors may set up against the Imperial Bank the title of Clarkson the assignee or any other person, for if the Imperial Bank had no right to interfere with the sheriff's seizure of the goods, it is nothing to the Imperial Bank that some one else might successfully oppose the claim under this execution. There was no occasion then to join Clarkson with the Merchants Bank in this proceeding. I think the Merchants Bank might be plaintiffs or defendants, and all the claimants joined as opponents, and the question would be whether the claim-

ants or any, and if any which of them, had the right to the goods as against the Merchants Bank. If all the claimants have the better title as against the Merchants Bank, the Judge would not under that issue try the title between the claimants themselves. The claimants might settle these rights between themselves, the purpose of the issue having been answered by its being settled that the execution creditor is not to have his execution satisfied out of the goods which were seized by the Sheriff.

The single issue I propose to be tried, it appears to me, will dispose of the rights of all the parties, and as the claimants are parties adverse to each other, the Imperial Bank and Clarkson will have their respective rights settled virtually and substantially as between themselves, and therefore the replevin suit between them should be stayed until the interpleader issue is determined.

The order will therefore be, that the interpleader issue now ordered to be tried between the Merchants Bank and Clarkson co-plaintiffs, and the Imperial Bank as defendants, be amended by striking out the name of Clarkson as a plaintiff and making him a defendant, and by rescinding the order so far as it directs an issue to be tried between the Merchants Bank and Clarkson as plaintiffs, and the Standard Bank as defendants; upon the Standard Bank being made a co-defendant with the Imperial Bank and Clarkson, in the issue herein mentioned; and that the order directing an issue to be tried between the Imperial Bank and the Standard Bank be rescinded, and the only issues substituted for these three issues shall be the one in which the Merchants Bank shall be plaintiffs, and the Imperial Bank, the Standard Bank, and Clarkson shall be defendants, and that the order relating to the issue directed to be tried between the two execution creditors, the Merchants Bank and James Walsh shall remain; and that the costs of this motion shall be costs in the cause to the respective parties.

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## KERSTERMAN v. McLELLAN.

*Domicile—Fraudulent flight to avoid arrest.*

It is of no consequence where the domicile of a person may be, or to what country he is bound by allegiance as a subject or citizen, if he comes to this Province, and reside here, and contract debts, and is about to quit the country (that is in fact to change his residence to a foreign country, even though that country be his place of domicile) with the intent to defraud his creditors, he is subject to arrest as it prevails in this Province.

*Held.* that a defendant cannot rely on a change of residence to a foreign country so as to avoid the law of arrest, to which he was subject in this Province at the time he incurred the debt upon which the action is brought, when that change of residence has been effected by a fraudulent flight to avoid arrest.

[October 26, 1883.—*Wilson, C. J.*]

A MOTION to set aside a writ of *capias* and all proceedings upon it and the arrest of the defendant thereon, or to discharge the defendant from custody thereunder, upon the grounds that the defendant was, at the time of the arrest, domiciled in, and a resident of the State of Michigan, U. S., and at the time of his arrest was within the jurisdiction of this Court for a temporary purpose only, and on grounds disclosed in the affidavits filed.

The facts appear in the judgment.

*Masten*, (*Bain, Gordon & Shepley*), supported the motion, he referred to, *Clement v. Kirby*, 7 Pr. R. 103; *Walker v. Dumb*, 9 Dowl. P. C. 131, 133; *McPhadden v. Bucon*, 9 U. C. L. J., N. S. 226; R. S. O. ch. 67, sec. 5; *Phillmore* on Domicile, pp. 120, 122, 146.

*S. G. Wood*, shewed cause and referred to *Frear v. Ferguson*, 2 C. L. Chamb. R. 144; *Bett v. Smith*, 1 Pr. R. 309; *Malloy v. Shaw*, 5 Pr. R. 250; *McGaffin v. Cline*, 4 Pr. R. 134; *Swift v. Jones*, 6 U. C. L. J. 63; *Terry v. Comstock*, 6 U. C. L. J. 235; *Robertson v. Coulton*, 9 Pr. R. 16.

WILSON, C. J.—The defendant is indebted to the plaintiff in the sum of \$1070, upon a mortgage dated the 12th of January, 1881, and it is said the land mentioned in the mortgage is an insufficient security, and that the loan of \$1000 was obtained by the defendant upon a false and fraudulent certificate of value of the land.

The facts appear to be, that the defendant was a land agent and had been so for some years before he left this Province. He got largely into debt, and was quite insolvent. He moved his wife and family in May, 1882, to Michigan. He was arrested by a creditor for debt sometime before July, 1882, in which action he put in bail, and he absconded from this country in that month and forfeited his recognizances. He is a British subject. After having gone to the United States he took means to become a citizen of that country, but it is said his citizenship has not and cannot become perfect for some time yet. Since the defendant left this country he has returned to it on at least three occasions, upon business as he says, and for only a temporary purpose. Upon one of these visits, in July or August last, he was arrested at the suit of the plaintiff, and he has been since then and still is in custody under that arrest.

He is now in custody also under five other writs of *capias*, and also upon a conviction for having obtained goods under false pretences. The term of imprisonment upon the criminal charge is about expiring.

It is not said, but I infer from the papers before me, the charge upon which the defendant was convicted was for an act committed by him before he left this Province in July 1882.

The defendant applies to be discharged from custody and to set aside the writ of *capias*, because he says he was not a resident of this Province at the time he was arrested in July last, and had not been since July 1882, when he left this Province with the intention of leaving this country and taking up his residence and making his home permanently in the United States of America, and that his oath of citizenship in the United States taken in January, 1883, by which he renounced his allegiance to Her Majesty the Queen, is in addition to the other circumstances, relied upon as conclusive proof that he had abandoned his former British domicile as well as his residence.

In August, 1882, it is sworn there appeared in *The Mail*

and in *The Globe* newspapers, an article purporting to be from the defendant, stating his intention to return to this Province, that he owned a large amount of real estate, more than would pay his debts three times over, and that he would settle all just claims against him, and that he went away because he received a telegram that one of his children, who had gone with his wife to Michigan was ill, and was not expected to recover. The defendant denies having published these articles, but he says if he did so it was in consequence of some of his creditors having threatened to publish some of his transactions in this country, in the newspapers in that part of Michigan to which he had removed.

The plaintiff contends the articles so published are sufficiently proved to have been the act of the defendant, and if so they disprove the truth of the defendant's assertion, that he left in July 1882, with the intent of permanently changing his residence from this country to that of the United States.

I am quite satisfied from the facts before stated that the defendant being under bail in this Province, and being largely indebted and unable to pay his debts, left this country, at a time and in a manner which may be justly called absconding from this Province with the intention of defrauding his creditors.

If the alleged fraudulent intent in leaving the country be any part of the defendant's case, for it is no part of the notice of motion, but it was said during the argument the defendant relied upon the absence of such intent to defraud his creditors, I decide it against him.

The other part of the case is, that the defendant was not liable to arrest because he could not be said to be about to quit Ontario for the purpose of defrauding his creditors, when he was about to quit it merely to return to his own home in the State of Michigan.

It is quite true he had made his home in Michigan since he left this in July 1882, unless the articles before published prove the contrary. I am not inclined to aid this



defendant, unless I am obliged to do so by the strict rule of law; he is not a person entitled by his conduct to receive any favourable consideration, or to ask that an indulgent construction should be placed upon his acts or motives. The articles published in the papers do assert that the defendant intended to return to this Province with his family, and to settle all just claims against him. If that be so he may for the purposes of arrest still be considered to be a resident of this Province.

But it was argued that the oath of citizenship in the United States, and the renunciation of his allegiance to Her Majesty, are conclusive evidence against any presumption of the defendants intention to return to this Province, or to have it considered he is for any purpose to be treated as a resident of this country.

That act of citizenship if assumed to be completed, although it is alleged it is not and cannot be, for a considerable time yet, will not affect more than the domicile of the defendant at most.

It is with his residence I am now concerned, for such adoption of citizenship and the renunciation of his former allegiance no more affect the residence of the party, nor his liability to arrest for debt, than his citizenship acquired by birth in the United States can affect the residence of such born citizen, or the liabilities resulting therefrom, if he takes up his residence in this Province.

It is of no moment where the domicile of a person may be or to what country he is bound by allegiance as a subject or citizen, if he come and reside here and contract debts here, and is about to quit the country (that is, in fact, to change his residence or place of abode to a foreign country even although that country be his place of domicile), with the intent to defraud his creditors, he is subject to the law of arrest as it prevails in this country of his residence, in like manner as a born resident Canadian.

The oath of citizenship taken by the defendant is not therefore conclusive proof of his permanent change of residence, not necessarily of any change of residence, excepting

in so far as a resident in the United States may be required by the law of that country to perfect a full title or claim to citizenship. If such residence be an essential part of the claim to citizenship before it can be acquired, it is a fact which may be relied upon as evidence of a change of residence to that country, but it is not conclusive proof of it, for the defendant may fail to maintain such residence there, and may therefore fail to acquire his citizenship.

If however, the citizenship be complete, the defendant might, like any other citizen of that country, place his residence wherever he pleases. Upon that part of the case I am not disposed to aid the defendant.

There is, however, another view of the facts which may be taken. I mentioned it at the argument, but it was not argued. Can the defendant rely on a change of residence to the United States, so as to avoid the law of arrest to which he was subject in this Province when he incurred this debt, when that change of residence has been effected by a fraudulent flight to avoid arrest? In other words, the absconding debtor set up his own fraud to defeat the process, or his subjection to the process which he fled from? I think he cannot. The residence of the defendant here was changed by fraud, the new residence has been acquired by fraud. If such a proceeding is to protect the absconding debtor, why may he not in a week after he has absconded, return here and defy all process of the law to touch his person?

If that cannot be done by merely one week's absence, can it be done after a month's or after six or after twelve month's absence, or can the debtor ever be safe from arrest even after five, ten, or twenty years foreign residence? I don not feel obliged to say at what period the limit should be placed at or after which an arrest should not be allowed of a person who at one time was an absconding debtor. It is probable there may be some period of limitation in such a case. But each case of the kind must remain to be determined according to the circumstances of the particular case.

It is sufficient for me to say that I think the defendant has not emancipated himself from the law of arrest to which he was subject when he fled the country to defraud his creditors, from any facts which have been submitted to me upon this motion. And I discharge the motion, with costs.

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ROBINSON v. BERGIN.

*Writ of attachment binds land from seizure—What is a seizure?*

The mere fact that a writ of attachment against an absconding debtor is in the sheriff's hands does not bind the debtor's land, and the land, is not bound until seizure.

The sheriff's bailiff went to and entered upon the land of the debtor, on which his family resided, and finding there no goods, did not leave any one in possession; he said that he had no instructions beyond the warrant to seize the land; he told the debtor's wife at the time that the land would be sold, but he did no other act of seizure.

*Held*, that there was no seizure, and that *fl. fa.* lands placed in the sheriff's hands subsequent to the writ of attachment, were entitled to priority.

[November, 1883.—*The Master in Chambers.*]

A motion by consent for a final order in an interpleader matter.

The facts appear in the judgment.

*Aylesworth*, for the attaching creditor,

*H. J. Scott, Q.C.*, for the execution creditor.

THE MASTER IN CHAMBERS.—This is an interpleader in which the parties have asked me to consider the matter, and make the final order, so that the matter may be settled either here or upon appeal, with small expense to the parties.

It is a contest between attachment creditors, under the Absconding Debtor's Act, and two other judgment creditors, who claim priority to the attachments.

The attachments were issued in April, 1882, and went into the sheriffs' hands at that date. The sheriff did what is

hereafter stated, in seizing the property (real estate) under the attachments; those cases went on in course, and in one the *fi. fa.* lands was put in the sheriff's hands in October, 1882, and the other in December, 1882. In the other two cases, where the plaintiffs are claiming against the attachments, the plaintiffs recovered judgments in July, 1882, and at that date put their *fi. fas.* into the sheriff's hands.

The land of the absconding debtor, the proceeds of which are now in question, had been mortgaged to a loan company, and in January, 1883, the company under a power of sale, sold the land, and some \$500 of an overplus was thereafter sent to the sheriff by the company, and it is as to the application of this money that the parties are contesting.

All the *fi. fas.* were in the sheriff's hands while the equity of redemption was yet in the absconding debtor.

It must be taken since the case of *Warener v. Kingsmill*, 13 U. C. R. 18, and the cases following it, that the mere fact of an attachment being in the sheriff's hands, does not bind the property: it is not bound until seizure, as was decided in that case.

Pearce, the sheriff's bailiff, swears that in May, 1882, under the said writ of attachment, and a warrant thereunder from the sheriff, he proceeded to, and entered upon, the lands in question, then occupied by the family of the absconding debtor, but owing to the fact that he could find no goods or chattels of the said debtor he did not leave any person in possession. In another affidavit made to identify the land he entered upon, he states that at the time he received the warrant the family of the absconding debtor were residing on the land, which is a cleared farm, and that it was upon that land that he made the seizure as described in his former affidavit, that some of the land was wild, but all used as one farm. Pearce was cross-examined on his affidavit. He states that the warrant which he returned to the sheriff's office has been lost, but that it was in the usual form of warrants under writs of attachment, he believed it would direct him to attach, seize, and safely

keep all the personal property, credits, and effects, together with all the evidences of title, and debts, books of account vouchers, and papers belonging thereto, of the absconding debtor. He told the absconding debtor's wife that the place would be sold. He stated that he had no instructions to seize the land beyond the warrant, that he recollects, and did no act of seizing it, except what he had described.

The sheriff's warrant I must take upon this to apply to personal property only, and therefore under the cases, I take it that the creditors claiming under the writs adverse to the attachments must succeed, and my order must be to that effect.

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CITIZENS INSURANCE COMPANY. v. CAMPBELL.

*Libel—Particulars—Striking out—Trial.*

Particulars in an action for libel cannot be struck out as insufficient; if those delivered are too general, the Judge at the trial will exercise his discretion as to the admission of evidence thereunder.

[November, 1883.—*The Master in Chambers.*]

ACTION for libel.

A motion to strike out particulars as insufficient.

*Rae*, for motion cited, *Gourley v. Plimsoll*, L. R. 8 C. P. 362; *Eade v. Jacobs*, 3 Ex. Div. 335; *Johns v. James*, 13 Chy. Div. 370; *Thornton v. Capstock*, 9 P. R. 535.

*Osler*, Q.C., for the defendant Campbell, relied on *Gourley v. Plimsoll*, L. R. 8 C. P. 362.

*H. J. Scott*, Q.C. for the defendant McCord.

THE MASTER IN CHAMBERS.—This is an action of libel for publishing of the plaintiffs' Company "that the management are greatly to blame for having established a branch in Great Britain, and also for their reckless underwriting in Canada."



He pleads a statement of the truth of the publication in general terms.

Upon this an order was made for particulars, and afterwards another order for further particulars. It is objected that the greater part of both sets of particulars is insufficient. The 6th, 7th, and 8th paragraphs of the original particulars, and the first paragraph of the amended particulars—I mean the paragraphs referring to the returns made to the Government by the plaintiffs' Company—seem to me to be sufficient, so far as they go.

All the other statements in both the sets of particulars seem to be not particulars at all, but general statements that give no information to the plaintiffs.

But what must follow from this? I think there are particulars which sustain the plea, which therefore, cannot be struck out. It is idle to make an order for further particulars, for the defendants allege that they cannot give them. An affidavit should be put in to this effect, and then it seems to me, it must be left to the Judge at the trial, to deal with the case as he shall see fit. I never heard of an application to strike out particulars; but if a mere general statement, giving the plaintiff no real information is inserted, the Judge at the trial will probably exercise his discretion as to it, when the defendant attempts to give evidence of such general matters.

I think the costs should be costs in the cause.

This is really a motion for further particulars, which, as to the general statements alluded to, are necessary,

On appeal. argued by the same counsel.

CAMERON, J., upheld the Master's judgment.

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## CROOKS V. STROUD.

*Examination of judgment debtor—Unsatisfactory answers.*

A satisfactory answer, upon examination as a judgment debtor, according to the statute R. S. O., ch. 50, sec. 305, means more than that the answer shall be a full, appropriate, and pertinent answer to the question : it means that the answer shall show a satisfactory disposition of the property.

The defendant in his examination said he had no real estate nor any personal estate.

In the fall of 1882 he had about \$300 in money ; he paid his bills with it, and lost the balance at the horse races at Buffalo. Since the fall of 1882 he has been in his father's employ ; he gets nothing but his board and clothing.

When asked as to the conveyance of the tannery lot to his father, which he held in trust for him, he said : " I could not say what the consideration was, or whether I was paid anything or not ; I forget ; I can't think of it, I forget whether I received any money for that then or since ; it was before judgment.

\* \* My father wanted me to get it fixed."

*Held*, that the defendant, in his examination, had disclosed his property and his transactions respecting the same ; and had not concealed or made away with his property in order to defeat or defraud his creditors,

*Held*, however that the defendant had not answered fully or truthfully with respect to the fact of receiving or not receiving money or other consideration ; and that the answers he had given respecting his transactions with his property were not satisfactory by reason of the illegal and wrongful disposition of it by gambling or horse-racing and otherwise.

Defendant was allowed to appear for further examination, and ordered to pay costs of first examination and this application forthwith.

[November 2, 1883.—*Wilson, C. J.*]

A motion to have it declared that the defendant, in his examination upon oath as a judgment debtor, taken before the deputy clerk of the crown, at Hamilton, on the 12th of September last, has not made satisfactory answers respecting his property, and that it appears from such examination the defendant has concealed and made away with his property in order to defeat and defraud his creditors, and the plaintiff in particular ; and that the defendant, pursuant to the statute, be committed to the common gaol of the county of Wentworth, or other gaol of the county in which he may be found, for such term of imprisonment as to the presiding Judge in Chambers shall seem proper, and that the defendant should pay the costs of and incidental to this application.

*Aylesworth*, for the plaintiff.

*Holman*, for the defendant.

WILSON, C. J.—This action was commenced in December, 1882, and judgment recovered against the defendant in March thereafter for \$1,500, besides costs.

The defendant, in his examination, said he had no real estate, nor any personal estate.

In the fall of 1882, he had about \$200 in money, he paid his bills with it, and lost the balance at the horse races at Buffalo. Since the fall of 1882, he has been in his father's employ—he gets nothing but his board and clothing. He said: "I paid Mr. Carscallen about \$150; I lost, in Buffalo at the races and at poker, \$125; and I lost about town and at the races on the ice last winter, about \$75." When asked as to the conveyance of the tannery lot to his father, which he held in trust for him, he said: "I could not say what the consideration was, or whether I was paid anything or not, I forget, I can't think of it. I forget whether I received any money for that then or since. I can't say when it was, but think it was before the trial at Milton. It was before judgment. My father wanted me to get it fixed."

I can't say the defendant has concealed or made away with his property in order to defeat or defraud his creditors or any of them, but I am quite convinced he has not made satisfactory answers respecting the same.

It is impossible the defendant can have forgotten whether he received any money or other consideration upon his conveying the tannery property to his father. Such conveyance having been made only in May last, a little more than four months before his examination, it is highly improbable he should not know what the amount or value of the money or other consideration he received was, as he does not, from his own statement, receive money enough for his board and clothing from his father, besides that, he receives from or takes from his father's money about from 10c. to 25c. a day for spending money.

I am not of opinion either that the defendant has made satisfactory answers respecting his property.

I think the true meaning of a satisfactory answer, according to the statute, means more than that the answer

is or shall be a full, appropriate and pertinent answer to the question, it means that the answers shall show a satisfactory disposition of the property. It is no doubt a full and precise answer to a question: "What have you done with the money you say you had upon a certain day?" To say, "I lost it at horse races and in gambling," but that is not a satisfactory answer.

The statute requires:

1. The debtor shall disclose his property, and his transactions respecting the same.

2. That he shall make satisfactory answers *respecting the same*. That is, respecting his *property*, and his *transactions respecting the same*.

And 3. That he shall not have concealed or made away with his property in order to defeat or defraud his creditors.

Now, a debtor that tells what property he had and who says he has lost it all by gambling and horse racing, does disclose his property and his transactions respecting it, does not violate the first of these three requirements.

Nor in such case has the debtor concealed or made away with his property, *in order to defeat or defraud his creditors*, and he does not therefore violate the third requirement of the statute.

If, therefore, the wild and indefensible squandering of money by gambling, horse racing, or other vicious courses, is not deemed to be an unsatisfactory answer—which, as I understand the Act means an unsatisfactory account—by the debtor of his property and his transactions respecting the same, then there is no punishment for one who wilfully diverts the means which he has, and which justly belong to his creditors, to these immoral purposes. It is true, such misapplication of his property may not be made *purposeously* to defeat or to defraud his creditors, but it is made in utter disregard of their rights, and of his duty towards them, and in the prosecution of illegal pursuits which are almost certain to end, and as the result may have proved, have ended in serious, or it may be in total loss. In my opinion, the answers, to be satisfactory, must be so not only in form,

but in substance, that is, the account given of the property must show "the transactions respecting the same" to be satisfactory, and not merely full and truthful.

I am of opinion the defendant has not answered fully or truthfully with respect to the fact of receiving or not receiving money or other consideration for signing his tannery deed, or the amount of it, if he did receive any such money or consideration, and I am of opinion the answers he has given respecting his transactions with his property, are not satisfactory by reason of the illegal and wrongful disposition of it by gambling at horse racing and otherwise.

I shall not, however, make an order for his committal, but I shall allow him a further opportunity of appearing before the same examiner, at such time and place as may be appointed by notice of the said examiner, and undergoing a further examination with respect to his property, and it will be better for him to answer more satisfactorily with respect to what he received, if he did receive anything, on the transfer of the tannery property, and even then it will be a matter for future consideration how he is to be dealt with in respect of the money he has dissipated in his gambling transactions.

And I direct the defendant shall pay forthwith the costs of the past examination and of this application.

*Order accordingly.*

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## GARLAND V. THE OMNIUM SECURITIES COMPANY.

*Prohibition—Division Court—Cause of action.*

The plaintiff lived in Ottawa, and the defendant corporation had its head office at Hamilton. The plaintiff made a mortgage to the defendants, and a dispute arising between the plaintiff and the defendants as to the amount of interest to be paid thereon, the defendants claimed the full interest according to the mortgage, and desired the plaintiff to remit it by mail to their office at Hamilton, which the plaintiff refused to do. The defendants then began proceedings under the power of sale contained in their mortgage, and also an action for the recovery of the land, whereupon the plaintiff paid the money to his solicitors in Ottawa, and the latter sent it under protest to the defendants solicitors in Hamilton, who in turn paid it to the defendants in Hamilton. On an action brought in the Division Court in Ottawa for the recovery of the money so paid under protest.

*Held*, that when the plaintiff made the payment by reason of the action against him the defendants former direction to pay by deposit of the money in the Ottawa P. O. was superseded; and that the payment having been made by the plaintiff in Hamilton, the whole cause of action did not therefore arise at Ottawa.

[November 7, 1883.—*Wilson, C. J.*]

An application for a writ of prohibition.

The facts appear in the judgment.

*Aylesworth*, for the motion.

*Watson*, contra.

WILSON, C. J.—The facts appear to be that one John Gardner by mortgage on 2nd September, 1880, obtained a loan of \$1,800 from the defendants. Gardner resided in Ottawa, and there made his application for such loan through Mr. Haycock, the agent of the defendants, who carry on business in the city of Hamilton. The money was required to enable Gardner to build, and the money was to be advanced by the company in such sums from time to time according to the progress certificates of the building, although the mortgage is drawn for payment of the mortgage money and interest upon and for certain fixed days, having no reference to periodical advances or payments by the company, nor to any abatement of interest in favour of the mortgagor in respect of money retained by the company.

Gardner swears interest was only to be charged upon and from the time the respective payments were made to

him, and that Mr. Haycock made the arrangement with him. Mr. Haycock says he did not, although he may have said he supposed the company would charge interest only from the time the payments were advanced by the company. The company say their course of business upon loans for building is to appropriate the entire loan to the particular mortgage, and to charge interest from the time of the mortgage, as they run a good deal of risk in such cases, with respect to mechanics' liens and other matters, and that Mr. Haycock had no power to make any such arrangement, as it is said he did make.

The company claimed the full interest according to the mortgage, and desired the plaintiff to remit it to their office at Hamilton, the plaintiff refused to pay it. The company gave notice of sale of the land under the power of sale in their mortgage, and they commenced an action for the recovery of the land. The plaintiff then paid the money to his solicitors in Ottawa, and they sent it under protest to the plaintiff's solicitors in Hamilton, and they paid it to their clients, the plaintiffs in Hamilton.

The plaintiff has brought an action in the Division Court in Ottawa, for the recovery of the money so paid under protest, and the defendants have applied for a prohibition to stay such suit, because they do not reside there, nor did the cause of action accrue there.

The plaintiff says he was told to remit the money by mail to the defendants at Hamilton, and so the cause of action by the payment at Ottawa accrued there. The defendants say that was before the notice of sale and action were begun, and that the plaintiff paid his solicitor in Ottawa, and that they were bound to pay it in Hamilton, as the mode of transmission before action was put an end to by the action, and that the payment was not made by the plaintiff's solicitors to the company, but to the company's solicitors in Hamilton, and so in either case the payment was complete only in Hamilton, and that the cause of action did not therefore accrue wholly within the jurisdiction of the Division Court at Ottawa.

So far as the payment to the company is concerned, it was made in Hamilton. The order by the company to the plaintiff to send by mail to them in Hamilton would have been a payment by the deposit of the money in the post-office at Ottawa. The plaintiff refused to pay at all. When he made the payment afterwards by reason of the action against him, that former direction was suspended; and he became liable to take or transmit the money at his own risk to Hamilton. The payment was therefore in law made by the plaintiff at Hamilton, and the whole cause of action did not arise at Ottawa. The "cause of action" has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse: Per Brett, J., in *Cooke v. Gill*, L. R. 8 C. P., at p. 116. See also per Bovill, C. J., in *Whinney v. Schmidt*, L. R. 8 C. P., at p. 120. See *Noxon v. Holmes*, 24 C. P. 541. I have referred also to the cases cited in the argument: *Stephens v. Laplante*, 8 P. R. 52; *Re Hagel v. Dalrymple*, 8 P. R. 183, and others, and I think the order for the writ must go, with costs.

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## PARIS MANUFACTURING COMPANY V. WALLS.

*Interpleader—Sale of goods before application.*

The sheriff having having seized goods of much greater value than the amount of plaintiff's execution which were claimed by a third party received from the claimant the amount due on the execution in cash, and withdrew from the seizure  
*Held*, that the sheriff had not thereby disentitled himself to relief by interpleader.

[November 23, 1883.—*The Master in Chambers.*]

An interpleader application by the sheriff of York.

It appeared that the sheriff having two executions against Thomas Walls & Sons, seized a large quantity of household furniture which was at once claimed by Catharine Walls, wife of one of the judgment debtors, as her separate property. The first execution creditor being satisfied from other property, directed the sheriff to withdraw from the seizure of the household furniture so far as his execution was concerned, and thereupon the claimant paid to the sheriff, in cash, the amount of the other execution with the stipulation that the sheriff should hold the same, and interplead as to it.

The sheriff, on receiving the money, withdrew altogether from possession of the goods seized, which greatly exceeded in value the amount paid to him by the claimant.

*Watson*, for the execution creditors, resisted the sheriff's right to interplead, contending that by withdrawing from the seizure at the wish of the claimant, the sheriff had precluded himself from interpleading. He cited *Boswell v. Pettigrew*, 7 P. R. 393, and the authorities there referred to.  
*Aylesworth*, for the sheriff.

*J. K. Kerr*, for the claimant.

THE MASTER IN CHAMBERS.—I cannot see any difficulty in the way of an interpleader, arising from the conduct of the sheriff as is suggested. After seizure the sheriff was

under notice of claim to the goods from Mrs. Walls. There was another execution besides the plaintiffs, but that is out of the way, and was so at the time of the sale, the writ having been withdrawn from the sheriff's hands. Then the sheriff allowed a sale by Mrs. Walls which had been advertised to proceed, on his receiving the full amount of the plaintiff's execution in money, which is now in his hands, to abide the result of an interpleader under the claim of Mrs. Walls, notice of which, as I have said, was already in his hands. The value of the goods was much in excess of the amount of the execution, and if the sheriff thought it for the interest of parties to allow the sale, which had been advertised, to proceed, I cannot see how the rights of any party to this money are affected by his act. If he had gone on to sell he would have had to stop the sale when he had sold enough to cover the plaintiff's writ and expenses, and the parties would have stood precisely where they do now in a contest as to the right to the money. So if the interpleader had been moved while the goods were in specie, the sheriff would have been ordered to relinquish possession on payment by the claimant into Court of the amount of the plaintiff's claim.

Where, as here, the value was much greater than the plaintiff's execution, I cannot see any imprudence or impropriety in the course taken. It was better that the expenses of advertising, and the preparations for sale should not be thrown away. No one had any advantage or disadvantage in the contest from the sheriff's act, nor has he become bound in any way to either of the parties.

The case cited, *Boswell v. Pettigrew*, 7 P. R. 393, is not like this case. There the sheriff had entered into, or rather had apparently acquiesced in an arrangement between an execution creditor and a mortgagee, as to the disposition of money, the produce of a sale, in entire disregard of the rights of two prior execution creditors, and it was held that the sheriff must therefore take upon himself the responsibility of distributing the money. But here it is otherwise, the full



value of the plaintiff's claim is in the sheriff's hands, subject to a decision as to the rights of the parties, and no one's position in the litigation is in any way affected, or was intended to be affected by the sheriff's act.

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### MCPHERSON V. MCPHERSON.

*Tenants in common—Rent—Execution creditors—Priority.*

The plaintiff was tenant in common with the defendants, and was proved to have received more than his proper share of the rent. The defendants claimed against the plaintiffs share of the land, for the excess of rent received by the plaintiff. There were executions in the sheriff's hands, and the execution creditors had come in under the decree in the cause.

*Held*, that the defendant's claim being simply for a debt for which an action might be brought, there was no actual charge until a judgment was obtained. That the execution creditors did not lose their priority by coming in under the decree, and were entitled to have it maintained.

And that the case was not varied by some of the defendants being infants.

[November 28th, 1883.—*Proudfoot, J.*]

AN appeal from the report of the Master at London.

*Purdum*, for the appellant.

*J. Hoskin, Q. C., Hoyles, and Macbeth*, contra.

PROUDFOOT, J.—The plaintiff was tenant in common with the defendants, and is found to have received \$134.55 more than his share. There are executions in the sheriff's hands against the plaintiff's lands, and the question raised by the appeal is, whether these executions have priority over the claim of the other tenants in common against the plaintiff for that excess of rent received by him.

The claim of these tenants in common against the plaintiff is simply for a debt. The case of *The British Mutual Investment Co. v. Smart*, L. R. 10 Ch. 567, establishes that a creditor of a person in the position of the plaintiff by equitable mortgage, and a creditor by

execution must be in as favourable a position, has priority over a creditor of a testator who subsequently obtains a charge on the assets, and the case is *a fortiori* where the defendants, as here, are not creditors of the ancestor, but of the plaintiff himself.

The claim here being simply for a debt, for which an action might be brought, there is no actual charge until either a judgment is obtained at law or a decree in equity. The execution creditors having come in under the decree, do not lose their priority. They are still entitled to have their priority maintained.

Nor do I think the case is varied by some of the parties being infants. Their right could not be placed higher than if a trust had been created in their favour. That was the case in the case cited, but Sir W. James, L. J., says : "It was a receipt by a trustee of that which belonged to another man, but after all it was nothing but a debt, and it must be treated on exactly the same principle as any other debt due from a deceased person would be treated."

See also *Kirkpatrick v. Stevenson* 3 O. R. 361, 368 ; *Foster on Joint Ownership*, p. 19, 20. *Courcier v. Courcier*, 26 Gr. 307 ; *Henderson v. Eason*, 17 Q. B. 701.

In *Courcier v. Courcier* there was no competition with creditors.

*Appeal dismissed, with costs.*

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## WILLS v. CARROLL.

*Jurisdiction of Master in Chambers—Absconding Debtors Act.*

After judgment has been entered against an absconding debtor pursuant to the finding of a County Court Judge on a reference under R. S. O. ch. 68 sec. 9, the Master in Chambers has no jurisdiction to set aside the judgment at the instance of another creditor who wishes to be let in to defend.

[December 13, 1883.—*The Divisional Court.*\*]

THE Master in Chambers, by an order, dated the 26th June, 1883, under R. S. O. ch. 68, sec. 9 (Absconding Debtor's Act), referred it to the County Court Judge to ascertain the amount for which judgment was to be entered.

The amount was ascertained, and judgment entered therefor.

Upon the application of Douglas, another creditor, the Master in Chambers, by an order, dated the 11th October, 1883, set aside the judgment entered, and allowed him to contest the plaintiff's claim.

Upon an appeal to a Judge in Chambers, the Master's order was set aside upon the ground that he had no jurisdiction to set aside the judgment, and that any such application should have been made to the Divisional Court.

That order of the Judge in Chambers is now appealed from.

W. Cassels, Q. C. (with him *Holman*), for Douglas, who appeals, contended that under R. S. O. ch. 68, sec. 10, the Master is the Court or Judge, and was the authority by which Douglas got in, and cited *Lavis v. Baker*, 13 C. P. 506.

*Holman.* Douglas got no notice of the order of the 26th June. The order of the 11th October was made on general jurisdiction, following *Lavis v. Baker*. Judgment entered was founded on the order of the Master, R. S. O. ch. 50, secs. 20, 64. In cases where proceedings taken under order

\*The Court was composed of BOYD, C., and FERGUSON, J.

to proceed are to be opened up, application should be made in Chambers: *Darrington v. Price*, 6 C. B. 359; *Smeeton v. Collier*, 1 Ex. 457; *Jackson v. Randall*, 24 C. P., 87, 6 P. R. 165; *Cotter v. Vansittart*, 9 U. C. L. J. 312; *Arch. Prac.* 13th ed. 1271; *Re Allan*, 31 U. C. R. 458; *Damer v. Busby*, 5 P. R. 356; *Taylor & Ewart*, O. J. A. 140.

*Aylesworth*, contra. There is no jurisdiction in the Master. The judgment was regular, and could not be set aside except by the Court: R. S. O. ch. 50, sec. 197. The Appeal is to the Court, not to a Judge: *Cole v. Campbell*, 9 P. R. 498. Interpleader although started in Chambers, cannot be afterwards interfered with there. If Douglas is allowed in to contest plaintiff's claim in toto the same as the defendant might do, he should secure the plaintiff's claim: *Offay v. Offay*, 26 U. C. R. 363.

*Cassels*, Q.C., in reply. Application for a new trial under Rule 307 O. J. A. must be made to Divisional Court; but "Court or Judge" in sec. 10 R. S. O. ch. 68, must be Judge in Chambers. If the defendant can go, then why not another creditor?

BOYD, C.—The Master's order, under secs. 8 and 9 of the Absconding Debtor's Act, directed the plaintiff to prove the amount of his debt before the Judge of the County Court. The finding or certificate of this officer is, by the Common Law Procedure Act, R. S. O. ch. 50, secs. 189, 197, enforceable by the same process "as the finding of a jury upon the matter referred." Therefore, the judgment which was signed in this case upon the certificate of the County Judge was equivalent to a judgment obtained after a verdict or assessment by a jury. In such a case, if relief is sought against this judgment by the defendant himself, he may, upon putting in special bail, and complying with the requirements of section 10 of the Absconding Debtor's Act, be allowed in to defend by the Court or a Judge. But apart from this special provision, the Judge in Chambers, or the Master, would have no authority to set aside the judgment at the instance of another creditor by virtue

of the equitable jurisdiction of the Court or otherwise : *McLaughlin v. McLaughlin*, 15 C. P. 182 ; *Rose v. Grange*, 27 U. C. R. 307 ; *Bonistiel v. McMaster*, 6 O. S. 32.

As the practice stands, my impression is, that such an application should be to the Divisional Court, if the analogy of the Common Law Practice is to be followed, or to one Judge in Court, if the analogy of the former Chancery practice is followed. Unless the trial be before a jury or before a Judge of co-ordinate jurisdiction, the Chancery practice has been to entertain appeals therefrom before one Judge, who, presiding in Court, exercised all the powers of the full Court: R. S. O. ch. 40, sec. 21.

The estate of the absconding debtor being available for execution creditors other than the plaintiff, under the statute the proceedings to realize and distribute are analogous to administration proceedings, and one creditor should be allowed to question the amount claimed by another. The Court of Chancery permitted subsequent incumbrancers to question the amount due upon prior judgments at law in ordinary cases where there was no relief at law, and would direct a reference for that purpose: *McDonald v. Boice*, 12 Gr. 48. The propriety of such a course is still more obvious in a case like this, where practically the fund is being administered by the Court: sec. 4, 46 Vic. ch. 6. This principle is recognized in *Lavis v. Baker*, 13 C. P. 506, and conditions might have been imposed by the Master in granting the order under sec. 8. which would have obviated this application. The Court has power to open the proceedings to allow the applicant to contest the claims of the plaintiff, and it should be done upon the terms set forth in the Master's order, now under consideration. Considering the uncertainty of the practice, it was not unreasonable for the applicant to go to Chambers in order to obtain a stay of proceedings, and to have the matter referred to the Court, as is suggested in *Rose v. Grange*, 27 U. C. R. 307, and *McLaughlin v. McLaughlin*, 6 O. S. 32, already cited. The costs occasioned by such a course of proceeding will be reserved till the contest now



set on foot is determined, and will then be disposed of by the Judge in Chambers. That will include all costs hitherto incurred, except the costs of the appeal to Proudfoot, J., which should be paid by Douglas. The terms imposed by the Master appear to be proper, and will be continued, save, that if the parties desire it, the matter may be referred to the Master at Woodstock instead of the County Judge. The disputes appear to be of such a character as will be better disposed of at an inquiry in the Master's office than upon a trial before a Judge at the Chancery sittings. This point may be spoken to before one of the Judges before the order issues.

FERGUSON, J., concurred.

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### MCLEAN V. SMITH ET AL.

*Judgment—Married woman—Setting aside—Time.*

The original process in the action was served upon the defendant, the married woman, personally; she swore that she handed it to her husband, but never authorized any one to act for her as solicitor. She was not proceeded against as a married woman. D., an attorney, appeared for her and her husband and judgment was signed against both defendants by consent of D. as her attorney, on an order made in Chambers in 1875. Execution was at once issued under the judgment, and the personal property of the female defendant was seized and sold by the sheriff without complaint from her. It appeared that at the time of the commencement of the suit the married woman had an interest in certain real estate which she and her husband conveyed away after action brought and before judgment.

No affidavit from the male defendant nor from D., the attorney, was filed.

*Held*, that after the long lapse of time and under the circumstances shewn the judgment should not be set aside.

[December 22, 1883.—*The Master in Chambers.*]

A motion to set aside a judgment entered against one of the defendants, a married woman, in 1875.

*McClive* for the motion.

*A. C. Galt*, contra.

THE MASTER IN CHAMBERS.—This is a motion to set aside the judgment against one of the defendants, the wife

of her co-defendant. She was not proceeded against as a married woman, and her *status* in that respect does not appear on the record at all. Judgment was obtained against her so long ago as 1875, in the ordinary form of a judgment against a person *sui juris*.

She and her husband appeared by an attorney, Mr. Douglas of Chatham, and the judgment was signed against both the defendants, by consent of this attorney, on an order made in Chambers. After this long lapse of time, the female defendant seeks to set aside the judgment against her, because she is, and was, a married woman, and the judgment against her is therefore not justified. She denies that she ever instructed an attorney to appear for her.

The original process was served upon her, which she says she handed to her husband, but that she never authorized anyone to act for her, as her attorney in the suit. It seems that previous to the commencement of the suit, she had real property in her own right, and at the time of the commencement of the suit, she still had an interest in it. That property the defendants conveyed away after the suit, and before the judgment in it.

Just after the judgment was obtained, an execution was issued upon it by the plaintiff, and personal property of the female defendant was seized and sold by the Sheriff under the writ. This appears to have been submitted to. There was no complaint then that I hear of, that Mr. Douglas had no authority to confess judgment.

The female defendant says she gave the process to her husband, but for what purpose did she do that? It would seem from the face of the papers, that they (the husband and wife) had an interest in delaying judgment until they had made a conveyance of the property spoken of, and it seems very probable under the circumstances, that the purpose of giving the writ to her husband was that he might make arrangements for defending the suit until that conveyance had been made.

Some authority must be attributed to the appearance

entered by Mr. Douglass. There is no *affidavit* from the husband, nor from Mr. Douglas. I refer to *Arch. Prac.*, 12th Ed., p. 90, 1. It may possibly be that Mr. Douglas, knowing of the property owned by the wife, may have thought her liable, and that the form in which judgment went was immaterial.

At any rate, after this long lapse of time, and all the circumstances of this case—I think the facts must be a good deal more strongly and clearly shown than they are.

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### RE WILSON V. WAINFLEET.

#### *Municipal law—Opening—Road allowance—Mandamus.*

It is discretionary with and not obligatory upon a municipal council to open a road allowance, and the fact that a by-law has been passed does not create such an obligation, and a mandamus was refused.

[December 24, 1883.—*Rose, J.*]

THIS was an application by plaintiff for a *mandamus* to compel the municipal council of the township of Wainfleet to open an *original road allowance*.

A by-law had been passed by the council in June, 1882, and notice given to the parties in possession, to remove all fences and other obstacles, from the road allowance. Nothing further was done by the council up to the time of making the application, November, 1883.

The case was argued before *Rose, J.* in chambers.

*B. B. Osler*, Q.C., for plaintiff.

*C. Robinson*, Q.C., and *R. Gregory Cox*, for defendants.

ROSE, J.—*Held* that it is discretionary with, and not obligatory upon a municipal council to open a road allowance; and that the fact that a by-law had been passed, did not make such an obligation; and that a *mandamus* would not be granted.

## DAVIES v. HUBBARD.

*Notice of trial—Service—Leaving copy in office of defendant's solicitor.*

Service of notice of trial effected by leaving a copy of the same in the office of the defendant's solicitor before six o'clock, but after the solicitor and his clerks had left for the day, takes effect only from the time when the notice came to the knowledge of the solicitor.

The practice laid down in *Consumers' Gas Co. v. Kissock*, 5 U.C. R. 542; *McCallum v. Provincial Ins. Co.*, 6 P. R. 101, held not to have been altered by the O. J. A. as to service upon a defendant's solicitor.

[December 31, 1883.—*The Master in Chambers.*]

NOTICE of trial of this action at the Sittings of the Court beginning on the 3rd January, 1884, was served upon the 24th December, 1883, about half-past four o'clock in the afternoon, (the defendant's solicitor and his clerks having at that hour left the office for the day) by leaving a copy of the notice upon the solicitor's desk. Neither the solicitor nor any of his clerks saw or knew of the notice till the morning of the 26th December.

*A. G. McLean*, for the defendant, moved to set aside the notice on the ground that it was served too late, and cited *Consumers' Gas Co. v. Kissock*, 5 U. C. R. 542; and *McCallum v. Provincial Ins. Co.*, 6 P. R. 101.

*H. Cassels*, for the plaintiff, contra.

THE MASTER IN CHAMBERS held that the practice as laid down in the cases cited as to service upon defendant's solicitor had not been altered by the Ontario Judicature Act, and made the order setting aside the notice of trial, with costs, to be costs to the defendant, in any event of the cause.

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## CHRISTOPHER V. NOXON ET AL.

*Taxation—Witnesses—Abortive trial—Rule 442 O. J. A.*

A taxing officer refused to allow the plaintiffs the expenses of seventeen witnesses who were subpoenaed to attend a trial at Hamilton which proved abortive, the trial being postponed because the defendants had not obeyed an order to produce.

The defendants were ordered to pay the costs of the hearing at Hamilton rendered nugatory by the postponement.

The seventeen witnesses were subpoenaed to be examined at the abortive trial, and were examined at the adjourned trial upon matters which the Judge held could not be interfered with by the Court.

*Held*, that in refusing the plaintiff's the costs of subpoenaing these seventeen witnesses, the taxing officer did not erroneously exercise the discretion given him by Rule 442, O. J. A.

[January 9, 1884.—*Proudfoot, J.*]

AN appeal from a taxing officer.

*G. Bell*, for the appeal.

*Hoyles*, contra.

The facts appear in the judgment.

PROUDFOOT, J.—This is an appeal from a taxing officer, because he has refused to allow the expenses of seventeen witnesses who were subpoenaed to attend the trial at Hamilton, a trial that turned out abortive from the defendants not having obeyed an order to produce, and the case was postponed to another day. By the decree the defendants were ordered to pay the costs of the hearing at Hamilton, rendered nugatory by reason of the adjournment of the cause. The Master has disallowed the expense of these witnesses, as they were subpoenaed to be examined upon matters concerning the internal management of the company, which the Judge held could not be interfered with by the Court. The reception of the evidence was objected to at the final hearing by the defendants' counsel, and was taken subject to the objection.

I think the taxing officer was right. The costs of the hearing at Hamilton which the defendants were ordered to pay, were costs that would have been properly taxable



had the cause been decided there. It was assumed by counsel on both sides that these witnesses were only examined on matters relating to the internal affairs of the company. These were not matters with which the Court could interfere, and evidence on the subject was inadmissible. The expenses of the witnesses for that purpose were therefore not taxable.

Rule 442 O. J. A., gives a very wide discretion to the taxing officer, as no costs are to be allowed which do not appear to him to have been necessary or proper for the attainment of justice.

I do not think it has been shewn that he has erroneously exercised this discretion: See *Arch. Prac.* 13th ed., p. 454.

*Appeal dismissed, with costs.*

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## RE LYONS

### *Costs—Scale of.*

After a mortgage sale the first mortgagee paid the surplus proceeds of sale \$162 into Court. The third mortgagee petitioned for payment out to him of the \$162 alleging that the second mortgage was void for want of consideration, &c. A reference was directed, and the Master found that the second mortgage was valid and that a much larger amount than \$162 was due upon it. The claimants of the fund lived in three different counties. An order made upon further directions gave the second mortgagee the costs of the petition and reference.

*Held*, that what was in contest was the whole amount represented by the second mortgage, and the subject matter thus involved exceeded the limits of the former equitable jurisdiction of the County Court, and therefore, and also because the different respondents resided in different counties, and the money in question was in Court in a third county, the taxing officer was right in taxing costs upon the higher scale.

[January 14, 1884.—*Boyd*, C].

THE surplus proceeds of a mortgage sale amounting to \$162 were paid into Court by the Union Loan Company, the first mortgagees.

There were four claimants of this fund, the second mortgagee Samuel Irwin, the third mortgagee Daniel Maclean, one Morrow an execution creditor of the mortga-

gor, and the mortgagor Lyons. Lyons and Irwin lived in Lindsay, Morrow in Peterborough and Maclean in Toronto.

A petition was filed by Maclean for payment out to him of the \$162, and alleging that the prior mortgage to Samuel Irwin was void for want of consideration, &c. A reference was directed to Lindsay, and the result was a report finding the second mortgage valid, and a much larger sum than the amount in Court still due to Irwin under it.

The order on further directions was made with costs on Irwin.

At the taxation it was contended by the petitioner that the costs should be taxed on the lower scale ; but the taxing officer overruled the objection.

*A. C. Galt*, for petitioner, on appeal from the taxing officer, referred to the following orders and authorities in support of his contention that the costs should be taxed upon the lower scale: Con. Stat. U. C. ch. 15, sec. 33 *et seq.*; 32 Vict. (O.) ch. 6, sec. 4; R. S. O. ch. 50, sec. 347; Rule 428, O. J. A., *et seq.*; Rule 511, O. J. A.; G. O. Chy. 553.

*Cassels*, Q. C., contra. The effect of the first order was to make an enquiry necessary into the entire amount due on Irwin's mortgage, so the amount in Court is not a fair test of the subject matter involved. The petition charged Irwin with fraud, and on this ground the higher scale should be applied. The different respondents lived in separate counties, and hence the equitable jurisdiction of the former County County Act could not have been resorted to.

*Galt*, in reply. The fact of fraud having been charged makes no difference, nor the fact that Irwin's mortgage was for more than \$200: *Forrest v. Laycock*, 18 Grant 611; *Re Scott—Hetherington v. Stevens*, 15 Grant 683.

BOYD, C.—I am not able to hold that the taxing officer erred in taxing costs on the higher scale in this case. Although the sum in dispute was the surplus of sale amount—

ing to \$160, yet potentially the application for payment out of the third mortgage involved an action to set aside and vacate the second mortgage, which represented on its face a security of some \$400 or \$500. To attack this it was necessary to bring the mortgagor and the second mortgagee before the Court, and the inquiry necessarily embraced a consideration of what was due on the second mortgage. Had the petitioner succeeded in cutting down the intermediate security to \$160 he would still have failed, as the money in Court would then have been applicable to satisfy that sum. These considerations indicated that what was in contest was the whole amount which was represented by the second mortgage, and the subject matter thus involved exceeded the limits of the former equitable jurisdiction of the County Court. I incline to think the taxing officer was right on both grounds—that the different respondents resided in different counties, and the money in question was in Court in a third county, and that the relief sought was in respect of a matter exceeding \$200.

I dismiss the appeal, and with costs.

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## BLAKE V. BUILDING AND LOAN ASSOCIATION.

*Appeal—Report—Time—Christmas vacation.*

The term "vacation" in G. O. Chy. 642, means Christmas as well as Long Vacation, and hence the former is not to be counted in the time within which an appeal from a Master's Report may be had under that order.

Notice of appeal from a report dated 29th November, 1883, given on the 31st December, 1883, for the 7th January, 1884, is valid.

[January 14, 1884.—*Boyd, C.*]

THIS was an appeal from the report of the Master in Ordinary, dated 29th November, 1883. The notice of appeal was given on the 31st December, 1883, for the 7th January, 1884.

The respondents objected that the notice of appeal had been given too late.

*W. Cassels*, Q. C., for the appellant.

*Hamilton*, contra, cited *Sivewright v. Leys*, 9 P. R. 200.

BOYD, C.—Before the consolidation of the general orders of the Court of Chancery the Christmas vacation was not excluded from computation of time. See Orders V. sec. 4, (30th June, 1858), and *Connolly v. Montgomery*, 1 Ch. Chy. R. 20. Both orders were consolidated as G. O. 408, and continued in substance in Rule 461.

In the consolidated orders, G. O. 422, was an original order providing for Christmas vacation, and G. O. 408, provided that the "time of vacation" should not be reckoned, which was an amendment of one of the originals of that order, *i. e.*, Order XXXII., which provided that the "time of the long vacation" should not be reckoned.

Under the consolidated orders it would be the result that both periods of vacation were to be excluded from computation but when the Judicature Act and Rules were passed the language was restored in R. 461, so that only the period of the long vacation was to be excluded, so far as that rule is applicable.

But to cases of appeals from the Master, there is a special provision to be found in the G. O. Chy. 642,

which is continued and extended to all divisions of the High Court of Justice by Rule 3. The time thereby excluded is the period of vacation generally, not limiting it to the long vacation. Prior to the Judicature Act, this order would exempt from computation both vacations, the reason and meaning of the order applies to both, as pending either vacation the Court does not sit, and the appeal cannot be prosecuted or brought on for argument during that time, whether at Christmas or Midsummer. I do not think the general provisions of Rule 461, should contract or limit the specific operation of G. O. 642, as to appeals from the Master. See *Re Turner*, 25 W. R. 206; *Conservators of the River Thames v. Hall*, L. R. 3 C. P. 415. By the practice prior to the Judicature Act, this appeal would be properly set down, and my view is, that this practice is still in force, as no other provision is made by the Act or the rules necessarily inconsistent therewith. In *Sivewright v. Leys*, 9 P. R. 200, it was assumed that time would run during the Christmas vacation, but there is no decision at variance with my ruling in the present case. I overrule this preliminary objection.

I reserve costs to be disposed of when the appeal is argued.

The other Judges concur in my conclusion.

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## MANSON V. MANSON.

*Purchaser—Judicial sale—Delivery of possession—Growing crops—  
Knowledge by purchaser of tenancy.*

At a judicial sale of a farm, the conditions of sale were the usual conditions of the Court, providing for the delivery of possession to the purchaser upon payment of the balance of the purchase money one month after the sale. The purchaser lived upon a part of the lot which was not sold, and was aware that the farm sold was occupied by a tenant, but swore that he did not know the terms of the tenancy, that he relied upon the conditions of sale, and that he bid more for the land because there were growing crops thereon. The purchaser paid the balance into Court at the proper time, but did not get possession then, nor had he got possession at the time of this application, January 7th, 1884.

*Held*, that the vendors were bound by the terms of the printed and published conditions of sale, and that it was not the business of the purchaser to acquaint himself with the terms of the tenancy, and by enquiry to ascertain whose were the crops.

Order made as asked, with a reference as to compensation.

[January 14, 1884.—*Boyd*, C.]

AN action brought for partition or sale of a farm.

The farm was sold under the judgment in the cause on the 7th July, 1883, and the ordinary conditions of the Court, providing that the purchaser shall have possession upon payment into Court of the purchase money within thirty days of the sale.

The purchaser at the sale owned and lived upon a part of the same lot in which the farm was situated, and was aware that there was a tenant in possession of the farm, and that there were growing crops thereon, but did not know the terms of the tenancy. In point of fact, the tenant's lease was not to expire until some time in 1884. The purchaser swore that he relied upon the conditions of sale, and that he bid more for the farm on account of the growing crops.

*Watson*, for the purchaser moved for an order for possession, and for compensation to the purchaser for the non-delivery of possession and for his loss of the growing crops, and for a vesting order.

*W. Mortimer Clark*, for the plaintiff.

*Harcourt*, for the infant parties.

BOYD, C.—I have considered this application and remain of the opinion I expressed at the close of the argument. The sale was conducted in this Court and under the usual conditions of sale, providing for the delivery of possession upon payment of the balance of purchase money one month after the sale. The balance was paid by the present applicant, but he did not then get possession. It is admitted that he lived upon part of the land which was not sold, and was aware that it was occupied by a tenant, but he denies being aware of the nature and terms of his tenancy. I think the vendors were bound by the terms of the printed and published conditions of sale, and that it would impair the confidence felt in judicial sales to give effect to the vendor's contention, that it was the business of the purchaser to acquaint himself with the terms of the tenancy, and by inquiry to ascertain whose were the crops. The crops growing on the land at the time of sale, and there at its completion, were sold with the land in the absence of any intimation to the contrary. The *dicta* relied upon in *James v. Lichfield*, L. R. 9 Eq. 51 were not applicable to a sale by the Court and are to be regarded as very questionable law after the observations thereupon by James, L. J., in *Caballero v. Henty*, L. R. 9 Ch. 449. That Judge there lays down the law, which it is evidently reasonable to apply to this case. He observes if there is anything in the nature of the tenancies which affects the property sold the vendor is bound to tell the purchaser, and to let him know what it is which is being sold, and the vendor cannot afterwards say to the purchaser, "if you had gone to the tenant and inquired you would have found out all about it."

Purchasers at a judicial sale are not called upon to go behind the advertisement, and they are entitled to hold the vendor to what is there stated as to the nature of the property and the terms of sale. That being so, the purchaser is entitled to the possession of the property, and a vesting order and to have a sum fixed for compensation for not getting the crops, or the possession.

at the time agreed upon. It will be referred to the Master for that purpose, who can direct evidence of witnesses near Peterborough to be taken by the Master there. Costs follow the result. If there were any crops which would not in law pass to the purchaser, the Master can discriminate as to them in fixing the compensation. No distinction of this kind was adverted to upon the argument.

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## LOVELACE v. HARRINGTON.

*Examination—Notice to solicitor—Rule 455 O. J. A.*

Rule 455 O. J. A., applies to the Chancery Division of the High Court of Justice. The service of a copy of an appointment to examine on the plaintiff's solicitor on a Saturday for a Monday is insufficient.

[January 21, 1884.—*The Master in Chambers.*]

THIS was a motion to enter judgment for defendant upon the ground that the plaintiff had made default in attending and submitting to be examined, pursuant to an appointment, and subpcena served upon him, for his examination in the cause. It appeared that the appointment had been taken out from the local Master at Sandwich, after issue joined.

*Holman*, for the plaintiff, objected that the copy of appointment was served upon the solicitor on Saturday, for Monday, so that forty-eight hours notice had not been given, as required by the practice, and referred to Rule 455, O. J. A., which provides, that where the time for doing any act is less than six days, Sundays are excluded in the computation.

*Hoyles*, for the motion, contended that under the Chancery practice, before the Judicature Act came into force, Sunday

would not have been excluded ; and that, as the case was in the Chancery Division, the equity practice should be followed.

THE MASTER IN CHAMBERS, having reserved judgment, held, that Rule 455 applied, and dismissed the motion.

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### BANK OF COMMERCE V. BANK OF BRITISH NORTH AMERICA.

#### *Third party—Amendment.*

A cheque had been drawn upon the plaintiffs, payable to the Hamilton Tool Company, and upon an endorsement, purporting to be that of the Tool Company, the defendants cashed the cheque, and upon presentation by them to the plaintiffs, were repaid the amount.

The Tool Company repudiated the endorsement. The defendant's solicitor swore that he had good reason to believe, and did believe that a third party was the beneficial plaintiff, and that there were equities which would attach as against the present plaintiffs.

Leave to add such third party was refused, but leave was given to the defendants to amend by alleging that the third party was the beneficial plaintiff, and to set up any defence that might be open to them on that ground.

[January 17, 1884.—*The Master in Chambers.*]

THE action was brought to recover the amount of a cheque cashed by the defendants on an endorsement alleged to be forged. The cheque had been drawn upon the plaintiffs, payable to the Hamilton Tool Company, and had been paid upon an endorsement purporting to be that of the payees. The defendants cashed the cheque, and upon presentation by the defendants to the plaintiffs, the former were repaid the amount of the cheque. Subsequently the payees, repudiated the endorsement as a forgery.

*Aylesworth* now moved, on behalf of defendants, for an order that Peter Ryan, of the City of Toronto, be added as a party plaintiff, or party defendant to the action, and that the defendants have leave to amend their statement of defence as they might be advised. The affidavit of the defendant's solicitor, set forth that he had good reason to

believe, and did believe, that the said Peter Ryan was the beneficial plaintiff in the action, and that there were equities which would attach as against the said Peter Ryan in this action, if he was made a party to the action, which would not attach as against the former plaintiffs.

*Holman*, contra.

THE MASTER IN CHAMBERS, after reserving judgment, held, that the defendants had not shown a case for adding Peter Ryan as a party plaintiff or defendant. The plaintiffs had no claim against Peter Ryan, and it did not appear to be necessary to add the said Ryan as a party for the purpose of settling the rights between the plaintiffs and defendants.

Leave was given to the defendants to amend by alleging that Ryan was the beneficial plaintiff, and set up any defence that might be open to defendants on that ground.

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### STANDARD BANK V. WILLS.

*Appeal—Money demand—Endorsement—Judgment—Rule 80, O. J. A.*

A writ was endorsed specially for \$910, the amount of a bill of exchange, and also asked to have certain conveyances, &c., set aside as fraudulent.

The Master in Chambers made an order for judgment under Rule 80, on January 11th.

PROUDFOOT, J., on an *ex parte* application of the defendant for leave to bring on an appeal from the Master's order on the 17th January, directed the appeal to be set down for Monday, January 21st.

*Held*, that the appeal was properly brought.

*Held*, also, that an order, for judgment under Rule 80 cannot be made except in an action where the plaintiff merely seeks to recover a debt or liquidated demand in money.

[January 24, 1884.—*Ferguson*, J.]

ACTION commenced by writ issued from the Chancery Division, specially endorsed to recover \$910, upon a bill of exchange, and also to set aside certain conveyances as fraudulent, &c.



On Friday the 11th January, *Holman*, for the plaintiff, moved before the Master in Chambers for leave to sign final judgment under rule 80, O. J. A., for the amount of the promissory note upon the usual affidavit that there is no defence on the merits &c.

*Hoyles*, for the defendant shewed cause, and read an affidavit by the defendant.

THE MASTER IN CHAMBERS considered that the affidavit of the defendant did not sufficiently shew the existence of a defence upon the merits, and made the order as prayed on the said Friday, January 11th.

No objection was taken before the Master as to the character of the endorsement of the writ.

The defendant desiring to appeal from this order, and Rule 407 requiring two clear days notice of appeal, and Rule 414 requiring the appeal to be brought on within eight days of the pronouncing of the order appealed from, it was impossible without leave to bring on the appeal upon a Monday, which is the day appointed for holding Chambers by a Judge of the Chancery Division. Accordingly on Monday, the 14th January, *Hoyles* applied *ex parte* to Proudfoot, J., for leave to bring on the appeal on Thursday, the 17th January. The learned Judge thought it would be more convenient to have the appeal heard on the Monday, and accordingly extended the time for bringing on the appeal so as to include Monday, the 21st January. No order was taken out on this application.

The appeal came on to be heard on Monday, 21st January, before Ferguson, J.

*Cassels*, Q.C., for the plaintiff objected to the appeal: (1) That the time should not have been extended *ex parte*. (2) That an order should have been taken out by the defendant. He cited *Hamilton v. Tweed*, 9 P. R. 448.

*Hoyles*, contra.

FERGUSON, J., after consultation with Boyd, C., overruled these objections, holding that the appeal was properly brought on, inasmuch as it could not have been brought on upon a Monday without leave, and the application for leave had been made in good time and Proudfoot, J., had fixed the regular Chambers day for the convenience of the Court.

*Hoyles*, then supported the appeal, contending that the defendant's affidavit was sufficient to entitle him to be allowed to defend, and also that this was not a proper case for judgment under Rule 80, O. J. A., as a writ cannot be specially endorsed under Rule 14, O. J. A., unless for a money demand *merely*. He cited: *Barber v. Russell*, 9 P. R. 433; *Fell v. Williams*, 3 C. L. T. 358; *Hill v. Sidebottom*, 47 L. T. N. S. 224; *Canadian Bank of Commerce v. Bricker*, 1 C. L. T. 729.

*Cassels*, Q.C., for the plaintiff, contra.

FERGUSON, J.—In this case the writ was endorsed specially for the amount of a bill of exchange for \$910, endorsed by some of the defendants. The endorsement on the writ however, goes on and claims other relief by asking to have certain conveyances and assignments set aside as fraudulent and void, and also claims that a lien on certain lands be declared in favour of the plaintiffs.

An order was made under Rule 80, empowering the plaintiff to sign judgment for the amount of the bill of exchange. At the argument I was unable to perceive how the order could have been properly made, and reserved the case because I was asked to reverse the order of the learned Master. I have since seen the Master, and he informs me that he was, when he made the order, under a misapprehension, and thought the endorsement was upon the bill of exchange only and under Rule 14, which is Order 3, Rule 4, (see Forms, Appendix A. No. 7), and that the action was one in which the plaintiff *merely* sought to recover a debt or liquidated demand in money. He informs me that he did not read the papers, and that

the endorsement was not stated to him. I am of opinion that the order must be reversed, but I do not consider that in reversing it I am reversing an actual judgment of the Master in Chambers, but rather correcting an oversight, as the Master's opinion in the actual case is, as he indicated to me, the same as my own. I have been in some doubt as to what I should do in regard to the costs of the appeal but the respondent having contended before me that the order was right I think I should give the costs against him.

*Appeal allowed, with costs.*

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MONTEITH V. WALSH.

*Trespass—Set off—Administration.*

In an action of trespass for entering the warehouse of a deceased person (of whom the plaintiff was the administrator) after his death and taking and converting the goods therein, the defendant set off a debt due by deceased to him. An administration order had been made of which the defendant had notice before defence. The set off was held bad under 27 Vic. ch. 28, sec. 28, and also because of the administration order.

[January 28, 1884.—*The Master in Chambers*].

THIS was a motion to strike out a defence of set off in an action of trespass for entering the warehouse of a deceased person, of whom the plaintiff is the administrator after the death of the deceased person, and converting the goods therein. The set off was of a debt due by the deceased to the defendant.

An administration order had been made, of which the defendant had notice before the defence.

*MacGregor*, for the plaintiff.

*Walter Barwick*, for the defendant.

THE MASTER IN CHAMBERS.—By the 28th sec. of the Property and Trusts Act, 29 Vic. ch. 28, in case of a deficiency of assets, all debts shall be paid *pari passu* and without any preference or priority of debts of one rank or nature over those of another, subject however to any lien existing during the life time of the debtor on any part of his estate.

It is in defiance of this law that this plea is pleaded. The deceased in his life time owed the defendant a large debt, and the defendant has entered and taken the goods lately of the deceased, with the purpose of paying himself in full, while the estate is not capable of paying the creditors more than about 4 cents in the dollar. At any rate, whatever other defences or reasons the defendant may have, if any,—the principle of this plea is, that such a transaction may be so defended. But it needs no argument to shew that it cannot be defended. The statement of it is enough. But it may be that this should rather be pleaded by way of replication to the defence, than be made the subject of a motion like this.

Then it is set off that is pleaded. (There is a counterclaim on the record of precisely the same matter, not however now before me). I cannot see that set off is allowable in such a case at all. It is true that Rule 127, O. J. A., is that a defendant in any action may set off or set up by way of counterclaim against the claim of the plaintiff, any right or claim, whether such set off or counterclaim sound in damages or not. Of these two, *set off* and *counterclaim*—counterclaim is by far the more extensive. As to set off, it has acquired a well known signification, and subject to the extension of it that is made by the rule, exists, it seems to me, as it always did, and is liable to the old limitations. It does not follow that because they are mentioned in the same rule, and may sometimes be used indifferently for the same practical object, that they are therefore co-extensive. Counterclaim may include every legal demand, but set off is no new introduction, but a remedy well known and long settled—enlarged by the

rule it is true, but, I take it, left in other respects as it was before the rule.

But suppose the action were for a debt arising from a transaction of the defendant with the administrator. The defendant could not plead as set off a debt due from the testator in his life time. The weight of authority seems to be overwhelming on this point. See *Rees v. Watts*, 11 Ex. 410; *Newell v The National Prov. Bank of England*, 1 C. P. D. 496. If he could plead such a defence where the testator died insolvent, what becomes of the clause of the statute I have cited above ?

But there is further an administration order in this cause of which the defendant had notice, before these pleas pleaded, and that requires me to set aside this plea.

I should do it with costs but for this consideration. Another motion has been made before a Judge as to the counterclaim. Both motions depend really upon the same considerations, and should have been only one motion..

*Order to strike out the plea of set off.*

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## DOER V. RAND.

*Security for costs—Præcipe order for—Setting aside—Stay of proceedings.*

A defendant is not necessarily entitled to security for costs because the plaintiff's residence is out of the jurisdiction.

If it be made apparent by evidence, which the Court should look at, that the defendant has no defence, security will not be ordered.

The defendant admitted on his examination in this cause, that he owed the debt sued for, but he afterwards alleged a counterclaim for illegal arrest by the plaintiff in the course of this action.

*Held*, that under these circumstances, the defendant was not entitled to security for costs, and a *præcipe* order for security was set aside with costs.

*Held*, that a *præcipe* order for security for costs is a stay of proceedings while it exists, and a motion for judgment made simultaneously with the motion to set aside the *præcipe* order for security for costs was refused.

[January 14, 1884.—*The Master in Chambers.*]

[January 29, 1884.—*Galt, J.*]

A motion by the plaintiff to set aside a *præcipe* order for security for costs and for leave to enter up final judgment for the plaintiff under rule 80, O. J. A.

The facts appear in the judgments.

*Knowles*, for the plaintiff.

*A. B. Cox*, for the defendant.

THE MASTER IN CHAMBERS.—The law as to security for costs is, I think, just as it was before the Judicature Act. There is some difference now in the manner of administration—not much—but the defendant's right and the plaintiff's liability remain just as they were. It always was, and now is, a matter eminently in the discretion of the Court. Of course I am understood as referring to that judicial discretion which would provide for the enforcement of the right, and guard against its abuse. The defendant is not *necessarily* entitled to security because the plaintiff's residence is out of the jurisdiction. That circumstance, standing by itself, creates a *prima facie* right, but that may be denied for many causes. One cause is quite familiar to all practising in Chambers, namely, that the security is not *necessary* for the protection of the defendant, as, where the plaintiff,

though out of the jurisdiction, has sufficient unencumbered property within the jurisdiction. There may exist many other reasons why security is not necessary. One reason is, if it be made apparent, by evidence which the Court should look at, that the defendant has no defence. I do not mean no defence *on the merits*, but no defence in law, because a defendant may have a perfect defence, which he is entitled to urge if he pleases, which is not on the merits at all.

The defendant here has admitted, on his examination had in this cause, that he owes the plaintiff the debt sued for; but he now alleges a counterclaim for an alleged illegal arrest of the defendant by the plaintiff in this action. Now, it is plain that it is upon the litigation of this latter cause that the defendant wants security for costs, because there can be no litigation as to the plaintiff's claim, which the defendant admits. But this counterclaim is not connected with the plaintiff's cause of action. It is, no doubt, alleged to have arisen in the plaintiff's prosecution of his cause of action, but it is a right in the defendant entirely independent of the plaintiff's rights in his cause of action against the defendant. Under such circumstances, the defendant having no defence to the plaintiff's claim, the cases show that the defendant is not entitled to security for costs. See *Daniells*, Ch. Pr., 6th ed., 80, 519; *Winterfield v. Bradnum*, 3 Q. B. D. 324; *Mapleson v. Masini*, 5 Q. B. D. 144; *Re Julia Fisher*, 2 P. D. 115.

I think that I must make an order setting aside the *præcipe* order for security for defendant's costs, with costs. I cannot now go further to consider the plaintiff's motion for final judgment, because the *præcipe* order is a stay of proceedings while it exists, except, of course, any proceeding to set aside the *præcipe* order itself. As to the part of the motion that asks for final judgment against the defendant, I give the plaintiff leave to renew it as he may be advised. I refer the parties to the following cases which bear upon such a proceeding under the facts here.

But I should say, in the first place, that there is no endorsement such as is contemplated by Rule 14 and Rule 80. See *Showell & Co. v. Bouron*, 52 L. J. Q. B. 284; 48 L. T. N. S. 613; 31 W. R. 550; W. N. 1883, p. 50. *The Mersey Steamship Co. v. Shuttleworth & Co.*, 48 L. T. N. S. 625. See same case in Appeal, W. N. 1883, p. 94; See upon this point, *Wallace v. Jackson*, 23 Ch. D. 204; 31 W. R. 519; W. N. 1883, p. 40.

The defendant appealed from the decision of the Master in Chambers setting aside an order for security for costs.

*Cox* relied on the decision of Cameron, J., in the case of *Bank of Nova Scotia v. Laroche*, 9 P. R. 503.

*Knowles*, shewed cause.

GALT, J.—The present case differs from that before Cameron, J., in this respect; here the defendant admits he has no defence, and, consequently, it is impossible that, under any circumstances, he can have a claim for costs against the plaintiff. It does appear to me that under such circumstances it would be very singular if the law entitled him to security for costs and a stay of proceedings until it was perfected. For this reason, and for those set out in the judgment of the learned Master in Chambers, this appeal is dismissed, with costs to be costs to the plaintiff in the suit.

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## ADAMS v. BLACKWELL.

*Interpleader—Sheriff.*

S. placed an execution in the sheriff's hands on the 11th December, and A. one on the 12th December. On the 20th December the landlord put in a claim for rent. The sale took place on the 21st, and the sum of \$1,707.06 was realized. On the 24th one H. notified the sheriff that he claimed all the money in his hands, and not to pay any over to anyone else. On the 27th December the sheriff paid S. in full and took a bond of indemnity from him. *Held*, that the sheriff was not entitled to an interpleader against H. and the landlord.

[January 21, 1884.—*The Master in Chambers.*]

THIS was an application for an interpleader order, on the part of the sheriff of the County of Middlesex. It appeared from the affidavits filed, that execution at the suit of one Smith was received on the 11th December, for \$821.05, and the execution at the suit of Adams on the 12th of December, for \$1322. The sale took place on the 21st December, when the sheriff realized \$1707.96. On the 20th December a claim was made by the landlord for \$626.30 rent and on the 24th December a claim was made by the plaintiff Adams, claiming all the moneys in his hands, and warning the sheriff against paying over any portion to any person other than Adams. On the 27th December the sheriff paid to the solicitors, for the execution creditor, Smith, the amount of his execution, and took a bond of indemnity. On the 9th of January, the sheriff served notice of motion for interpleader, calling upon the plaintiff Adams, and the landlord, to show the nature of their respective claims.

*Holman*, for the plaintiff, objected that the sheriff had deprived himself of any right to relief under the Interpleader Act, in that he had paid over to the plaintiff Smith the amount of his execution, notwithstanding notice of claim by Adams, which would necessitate an action against the sheriff by Adams, even if he succeeded against the claim for rent. See *Churchill* on Sheriffs, 2nd ed. p. 165; *Brain v. Hunt*, 2 Dowling, P. C. 392.

*Aylesworth*, for the sheriff, contended that it was open to the sheriff to recognize the claim of the first execution creditor, and at the same time to obtain the benefit of the Interpleader Act, as to the balance, in that the rights of the plaintiff Smith, and the landlord were distinct.

*H. J. Scott*, Q. C., for the landlord.

THE MASTER IN CHAMBERS held that the sheriff by his payment of the amount of Smith's execution, had disentitled himself to any relief under the Interpleader Act, and dismissed the motion with costs.

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#### GAGE V. CANADA PUBLISHING COMPANY ET AL.

##### *Security for costs—Insolvent surety.*

When one of the sureties in a bond given to secure the costs in the Court below became worthless, the Master in Chambers held that the respondent was entitled to a new one.

[January, 30, 1884.—*The Master in Chambers.*]

*Holman*, moved on notice, for an order removing stay of execution herein, imposed pending the appeal of the defendants to the Court of Appeal, on the ground that one of the sureties in the bond given to secure the costs of the Court below, had become worthless, and was no longer a good and sufficient surety.

*Davidson*, for the Canada Publishing Company, objected that the respondent was not entitled, after the security had once been allowed, to require from the surety an affidavit as to his sufficiency upon which a cross-examination might be had by the respondent.

*Barwick*, for the defendant, S. G. Beatty, contended that the bond having once been allowed, the respondent could not require the substitution of a new surety, even though the previous surety had become worthless.



*Holman*, replied, citing *Saunders v. Furnival*, 2 Chy. Ch. 159.

THE MASTER IN CHAMBERS, after having taken time to consider, held that the respondent was entitled to have a new surety. A different rule prevailed with reference to security for costs (*Archbold's Practice*, 13th ed., 1145,) which did not apply to security given for a debt, or costs of the Court below.

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### FREEL V. MACDONALD.

*Local Master—Jurisdiction of—Judgment—Rules 80, 422 O. J. A.*

Rule 422 O. J. A. and its subsection (a) must be read together, and hence the limitation in the subsection of the jurisdiction of the County Judge in certain cases curtails that of local Masters in similar cases.

The local Master at Hamilton in the county of Wentworth, gave leave to sign final judgment under Rule 80 O. J. A., in an action in which the solicitor for the defendant had his place of residence and office at St. Catharines, in the county of Lincoln, and no office in Hamilton.

*Held*, that under Rule 422 O. J. A., the local Master had no jurisdiction to make the order.

[March 24, 1884.—*Boyd*, C.]

AN appeal from the order of the Local Master of the Supreme Court of Judicature at Hamilton, giving the plaintiff leave to sign final judgment under Rule 80, O. J. A.

The action was begun by writ issued from the office of the Local Registrar of the High Court of Justice, at Hamilton.

The solicitor for the plaintiff resided and had his office in the city of Hamilton, the county town of the county of Wentworth; the solicitor for the defendants, resided and had his office in the city of St. Catharines, in the county of Lincoln, and had no office in the city of Hamilton.

Upon the argument of the motion for judgment before the Local Master, counsel for the defendants objected that the Master had no jurisdiction, and rested their opposition to the motion on that ground alone.

The Local Master construed Rule 422 O. J. A., in such a way as to give himself jurisdiction to make the order, holding that sub-section (a) of that rule limited the powers of the County Judge, but not of the Local Master, in "any action wherein the solicitors for all parties do not reside or have not offices in the county town of the county in which the action is brought."

*Hoyles*, for the appeal. The object of the Ontario Judicature Act was not to affect such a decentralization of business as the Master's holding would cause. If the Local Masters have such powers, the result will be, that all actions in outer counties will be brought in the Chancery Division. Sub-section (a) of Rule 422 O. J. A., limits the powers of the Local Master, as well as of the County Judge. He referred to: *Holmested's Manual of Practice* 214; *Omnium Securities Co. v. Ellis*, 2 C. L. T. 216; *Maxwell on Statutes*, 233; *Holmested's Rules and Orders*, 340.

*Holman*, contra. By R. S. O. ch. 50, sec. 148, certain powers were, before the Ontario Judicature Act, given to County Court Judges, in actions in the Courts of Queen's Bench and Common Pleas, and by Chancery General Order 36, even greater powers were given to the Local Masters in causes in the Court of Chancery. There is no reason why the powers of the Local Master should not still exceed those of the County Judge.

BOYD, C.—The Master has proceeded under Rule 422. If you simply look at the first part of the rule, his decision is very well, but sub-section a must be read with the previous part. The whole scope refers to the powers of the County Judge. The rule is one entire thing, and the first part cannot be dissevered from the last. The particular jurisdiction given there was as a relief of the Local Master who, prior to the passing of the Act, had certain functions, and got fees therefor. The exception was made in cases where the Master's revenue would be curtailed by the County

Judge having power in Chancery actions, but with the same limitations upon the jurisdiction of the Local Master. The difficulty has arisen from the unfortunate use of the word "hereinbefore" instead of "herein, which has a definite meaning under the Interpretation Act. "Hereinbefore" in this rule must be read as if it were "herein," and the succeeding clause limiting the jurisdiction must be read as incorporated with the first clause of the rule.

Without doing much violence to the language of the Act, and at the same time carrying out its obvious intention, I may hold that the powers of the Local Master are subject to the same limitations as those of the County Judge.

The appeal is allowed. Costs to be costs to the defendants in any event; and the order for judgment is rescinded without prejudice to a new application for judgment being made to the proper officer.

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## MUNSIE V. LINDSAY.

*Improvements under mistake of title—R. S. O. c. 95, s. 4—Occupation rent—Tenants-in-common—Cutting timber.*

Improvements made under a mistake of title are not, since R. S. O. c. 95, s. 4, to be allowed for as liberally as improvements made by a mortgagee in possession. The enhanced value of a farm, improved under a mistake of title, is found by deducting from the present value of the land, with the improvements, the estimated present value of the land without the improvements, plus any increase in value from other causes than such improvements.

The occupation rent chargeable to a person improving land under a mistake of title is the rental value of the land without the improvements.

A tenant-in-common occupying the common property is not chargeable with the value of timber cut by him on such property during his occupancy.

[June 11, 1883.—*The Master in Ordinary.*]

THE case directing the reference to the Master is reported in 1 O. R. 164. A case arising out of the administration of the personal estate of the same testator is reported ante p. 98.

The facts appear in the judgment.

*Brough*, for the plaintiffs.

*Hoyles and Barwick*, for the defendant Lindsay.

MR. HODGINS, Q. C., MASTER IN ORDINARY :—The judgment in this case allows to the defendant Lindsay the amount by which the lands and premises in the pleadings mentioned have been enhanced in value by lasting improvements made thereon by the defendant under the belief that the lands and premises were his own.

The lands were originally owned by one William Munsie, who died in 1854. By his will he devised the lands to his wife for life, and after her death to his son Robert Munsie, who it appears was one of the attesting witnesses to the will. Robert Munsie conveyed the lands in 1861 to his brother, James Munsie, who in 1864 sold them to the defendant Lindsay. The tenant-for-life died in 1874. The judgment declares the devise to Robert Munsie invalid, and that as to the remainder in fee after the life estate, the testator died intestate. The defendant Lindsay, by virtue

of the conveyances referred to, is a tenant-in-common with those heirs of the late William Munsie who are not affected by the conveyances ; and the judgment partially recognizes his rights as such.

Compensation for improvements does not necessarily depend upon their being made under a mistake of title. Thus a part owner who *bonâ fide* permanently benefits an estate by repairs or improvements, and a tenant-for-life completing permanently beneficial improvements to an estate which had been begun by the testator, have been allowed a lien for their expenditure : *Snell's Equity*, page 143.

The cases heretofore decided by the Court do not prescribe very clearly defined rules by which the enhancement in value of lands, by reason of improvements made under a mistake of title, should be arrived at.

The English cases appear to allow the full value of the improvements, as in the case of a mortgagee in possession : *Neeson v. Clarkson*, 2 Ha. 176, 4 Ha. 97. The American cases are much to the same effect : *Hilliard on Vend.* 48. And the earlier Chancery cases in this country apparently follow the same principle. In *Bevis v. Boulton*, 7 Gr. 37 ; *Brunskill v. Clarke*, 9 Gr. 430 ; *Fitzgibbon v. Duggan*, 11 Gr. 188 ; the actual expenditure for improvements by which the estate had been substantially improved, was allowed.

But in *Smith v. Bonisteel*, 13 Gr. 29, 35, the decree directed an account of the improvements made by the defendant, and to what amount and in what proportion they had enhanced the value of the property. In *Pegley v. Woods*, 14 Gr. 48 ; *Morley v. Mathews*, *Ibid.* 551, the compensation allowed was based upon the enhanced value given to the land by the improvements. In *Carroll v. Robertson*, 15 Gr. 173, cases were referred to which showed that improvements made under a mistake of title had been allowed far more liberally than to a mortgagee in possession. A mortgagee in possession is allowed the amounts expended by him in necessary repairs and lasting improvements, with interest thereon : *Quarrell v. Beckford*, 1, Mad.



273; *S. C.* 14 Ves. 177; *Webb v. Rooke*, 2 Sch. & Lef. 676; subject, however, to certain restrictions: *Sanson v. Hooper*, 6 Beav. 246; *Jorton v. South Eastern R. Co.*, 2 Sm. & Giff. 48, 73.

*Gummerson v. Banting*, 18 Gr. 616, was decided prior to Mr. Bethune's Act, 36 Vic., c. 22, R. S. O. c. 95, s. 4; and in that case, Spragge, C., following a decision of Mr. Justice Story, (*Bright v. Boyd*, 1 Story's Rep. 478, 2 Story's Rep. 605), directed an account of the value of the improvements made, and how far the value of the land had been increased by such improvements. The statute now defines the lien for improvements made under a mistake of title to be—not the amount actually expended, but—"the amount by which the value of the lands is enhanced by such improvements," so that the liberal rule referred to in the earlier cases, and in *Carroll v. Roberston*: 15 Gr. 73, is no longer applicable; and the person claiming such lien cannot now be dealt with as a mortgagee in possession. The cases of *Fawcett v. Burwell*, 27 Gr. 445; and *McGregor v. McGregor*, 5 O. R. 617 do not lay down any general rules prescribing how this enhanced value of the land should be ascertained.

During the evidence in this case I stated that because the measure of relief in cases like the present was new, the parties had not apprehended the change in the law, and were directing their evidence more to the ordinary case of a mortgagee in possession, than to that of a person claiming a lien, not for the actual cost of the improvements but, for the enhanced value given to the land by reason of such improvements; that I did not see how I could consider minute details or calculations based upon the cost of the different materials used, the estimated cost of teaming such materials, the cost of construction, and the estimated value of the defendant's labour in making the various improvements claimed. I said I should consider the case as it would be dealt with at *Nisi Prius*; and that in a case of this kind I thought a jury might be directed to find:—

1st:—Had the lasting improvements been made by the defendant under a mistake of title; and if they should so

find, then they might consider what, on the evidence, the improvements had cost the defendant,—not so much with a view to their giving a verdict for the actual cost, but as an assistance to them in considering the other and further questions to be considered, which would be :

2nd :—What was the present value of the farm with the improvements made by the defendant ?

3rd :—What was the value of the farm when the defendant purchased it ; and what would the farm be worth now if in the same state without the defendant's improvements ?

4th :—Had the farm, since the defendant's purchase increased in value from other causes than the defendant's improvements ? and, if so, to find such value.

Having thus ascertained the several values above enumerated, the jury might then be directed to find the enhanced value by deducting from the present value, the unimproved value, and also the value from other causes than the improvements. And in arriving at such a conclusion they might give some consideration to any opinion they had formed of the actual cost or value of the improvements, so that their verdict should not in any event exceed such actual cost or value.

Guided by these propositions I have considered the evidence,—very conflicting in some instances—adduced by the parties. Ten witnesses place the present value of the farm with the improvements at \$7000, while three place it at from \$6000 to \$6500. The weight of evidence is therefore in favor of \$7000. But the evidence as to the unimproved value of the farm is not so satisfactory.

Three witnesses belonging to the Munsie family were examined on behalf of the plaintiffs, but their evidence impressed me with the idea that their family pride had been hurt by the sale of their old home, and that they held the farm—and quite naturally—at a higher value than others not so personally interested in it. I have not therefore given much weight to their evidence. Besides, two of these three witnesses had not been on the farm for some time prior to Lindsay's taking possession in 1864. Two

other witnesses for the plaintiffs stated that they had not been on the farm during the time Lindsay was in possession, until they made their examination of it a few weeks previously with a view to their giving evidence of value; and as to one of these witnesses, I came to the conclusion, which I noted during his examination, that I should not place much reliance on his evidence. The other of these two appeared to be a shrewd, hard man of business, who stated, in answer to a question, that his estimate of value was based upon what he would be willing to give if he were buying the property. Two other witnesses for the plaintiffs had that personal knowledge of the farm which showed they were competent to speak as to its original state; and they considered that the farm, when the defendant purchased was worth \$4500 and \$5000; and that its value now would not differ from its value in 1864.

Against the opinion of these witnesses, the defendant examined six witnesses, owners of adjoining farms, all of whom had personal knowledge of this farm prior to, and during the defendant's occupation of it. The defendant was also examined on his own behalf, and proved that he gave \$4400 for the farm; that he thought it was too much, but he got his own time to pay for it. He gave his evidence as though he was trying to state his case in a fair manner. Other witnesses stated that their opinion at the time the purchase was made was, that the defendant had given too much for the farm, and on cross-examination they gave the names of several of their neighbours who expressed similar opinions at that time. Five witnesses swore that \$3000 to \$3500, was the value of the farm when the defendant purchased; one placed the value at \$3700. The general effect of their evidence was, that the farm at that time had been run down by reason of its having been badly farmed by tenants, and that, as to its improved value, it would not now bring as much as it would in 1864 if in the state it was then. These six witnesses placed the present value of the farm without the defendants improvements,—some at \$3000, and others

at \$3500. They also swore that all the defendant's improvements had enhanced the value of the farm to the amount of \$3500.

In determining the compensation to which the defendant is entitled, I think I am bound to find, as one of the factors, what the present value of the farm would be without the defendant's improvements: See Mr. Justice Story's decree in *Bright v. Boyd*, 2 Story's Rep. 605. The enhanced value can only be arrived at by a comparison of the present value of the farm as improved, with what its present value would be if in an unimproved state. To take the value of the farm at the time of purchase, and compare it with the present improved value, would obviously be unfair, for a farm may increase or decrease in value as years go on from various extrinsic causes, such as proximity to, or distance from, railroads, high or low prices of grain, nearness or remoteness from markets, general improvements in localities, speculations, or other causes. In this case there was evidence that the farms in the township had increased in value since 1866 by reason of certain railroads. The evidence on this latter point was very general, and has made it difficult to arrive at a fair estimate of such increased value. I think on the whole it will be more accurate, and therefore safer to base such value upon actual calculations rather than the random guesses of witnesses. Several witnesses showed that the opening of railroads in the locality had had the effect of reducing the cost of transporting grain to market by about 2 cents per bushel, and that the farms in the neighbourhood produced about 1400 bushels a year. This would give a profit of about \$28 per year. From this should be deducted the annual railway tax, at present about \$10 a year, which would leave a net annual profit of \$18, representing the annual interest on a capital of \$300.

The case is eminently one for the consideration of a jury; and although juries are bound to give their verdict "according to the weight of evidence," it is well known to both Judges and the profession, that their verdicts are sometimes rather compromises on the conflict of evidence, than



findings according to the weight of evidence. It is not proper in a case of this kind to seek to effect a compromise between the divergent opinions of the two sets of witnesses examined on this reference. The decision should rest upon the question which of the two sets of opinions given in the evidence is correct. I have already expressed an opinion in respect to some of the plaintiff's witnesses, and intimated that only two of them could safely be relied upon in forming a just judgment on the facts affecting this case. Against their opinions are the opinions of six others equally competent. In this conflict of opinion it is proper that the weight of evidence should govern; and such weight of evidence is in favor of the values sworn to by the defendant's witnesses. Excluding the defendant's own testimony, I find that five of the witnesses say that the defendant's improvements have increased the value of the farm by \$3,500—one that they have increased it by \$3,000 to \$3,500. But I prefer to find the value by the rules above referred to; and giving effect to the weight of evidence I find that the value of this farm in 1864, without the defendant's improvements, was \$3,500, and, if in the same state, it would be worth the same now, but with a further value caused by the railways, which I find to be \$300. These two values together make the present value of the farm, without the defendant's improvements, \$3,800. The present value with the defendant's improvements is \$7,000; and deducting from this the \$3,800, leaves \$3,200 which I find to be the amount by which the lands and premises in the pleadings mentioned have been enhanced in value by the lasting improvements made thereon by the defendant Lindsay, under the belief that the lands and premises were his own.

The judgment charges the defendant Lindsay with a proper occupation rent since the death of the tenant-for-life in 1874. The defendant is one of the tenants-in-common of this property, and has occupied it for his own use and benefit. Ordinarily a tenant-in-common occupying the common property without excluding his co-tenants is not liable to them for an occupation rent or for profits. The



Statute 4th Anne, c. 16, s. 27, enables a tenant-in-common to bring an action of account against his co-tenant "for receiving more than comes to his just share or proportion." Prior to the statute there was no such right of action at common law: *Wheeler v. Horne*, Willes, 208; for, says Co. Lit, 199b., "one tenant-in-common taking the whole profits, the other hath no remedy in law against him, for the taking of the whole profits is no ejectment." The only remedy therefore is the action given by the statute: *Henderson v. Eason*, 2 Phil. 308; and such action will lie only for a share of the rents actually received by such tenant-in-common, and not for the profits or produce derived from his sole enjoyment of the joint property: *McMahon v. Burchell*, 2 Ha. 97, 5 Ha. 322, 2 Phil. 127; *Henderson v. Eason*, 15 Sim. 303; 2 Phil 308, 12, Q. B. 986, 17, Q. B. 701; *Sturton v. Richardson*, 13 M. & W. 17; *Nash v. McKay*, 15 Gr. 247; and not more than six years arrears of rent are recoverable: *Reade v. Reade*, 5 Ves. 749; *Drummond v. Duke of St. Albans*, Ibid. 439; *Tarlton v Goldthwaite*, 6 Ala. 346.

This occupation rent should be based upon the rental value of the farm in its unimproved state: *Morley v. Matthews*, 14 Gr. 551; *Carroll v. Robertson*, 15 Gr. 173; *Bright v. Boyd*, 2 Story's Rep. 605; unless where interest is allowed on the expenditure for improvements: *Fawcett v. Burwell*, 27 Gr. 445; and it may be regulated by the amount of interest allowed to the defendant on the purchase money and on the value of his improvements, but should not exceed such allowance of interest: *Morton v. Ridgeway*, 3. J. J. Marshall, 257; *Witherspoon v. McCalla*, 3 Dessaur, 245. And this seems consistent with the rule that a vendor, receiving interest on the purchase money is liable to the purchaser for the rents he has received: Sugden, V. & P. 493. See also *Stevenson v. Maxwell*, 2 Sandford, Ch. 302.

On the rental value of the farm unimproved, the weight of evidence is with the defendant's witnesses, and though they vary in their estimate from \$100 to \$150, I think the latter sum is the fair value; and as the judgment deter-

mines the period of liability, I find that a proper occupation rent to charge the defendant since the death of the tenant for life in September, 1874, is the sum of \$150 per annum. The judgment allows the defendant his taxes paid on the property ; and as a tenant-in-common, I assume he will be entitled to a share of the \$150 rent with which he is chargeable.

The plaintiff seeks to charge the defendant for cutting and removing timber and other trees. The evidence shows that the defendant used the farm in a husbandlike manner, and that he considered the farm his own, and used only the fallen timber for fences and firewood. Besides, as a matter of law, a tenant-in-common is not liable to his co-tenants for cutting timber on the common property: *Martin v. Knollys*, 8 T. R. 146; *Rice v. George*, 20 Gr. 121. See also the cases referred to in *Re Kirkpatrick—Kirkpatrick v. Stevenson*, ante p. 4.

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## WILEY V. LEDYARD.

*Mortgage—Taking account in M. O.—Collateral security—Statute of Limitations—Arrears of interest—Pleading.*

On a reference to take accounts in a mortgage case it is not open to the defendants to contend that the original loan was *ultra vires*; nor can any defence be raised in the Master's Office which, if allowed, might result in determining that the Court had made a nugatory order of reference.

When certain securities had been assigned as collateral for the payment of a promissory note of \$1,000, which note was partly paid and a new note given, such securities may be held until the debt is discharged by payment.

Though the remedy of a creditor to recover a debt be barred by the Statute of Limitations, he may hold the collateral securities for such debt until paid.

Where no claim for arrears of interest is specially made by the pleadings, and where there is no covenant to pay interest, only six years' arrears can be recovered.

[December 10, 1883.—*The Master in Ordinary.*]

A reference from the Common Pleas Division in a mortgage suit.

*J. R. Roaf*, for the plaintiff.

*W. A. Foster*, and *G. H. Watson*, for the defendants.

The facts appear in the judgment.

MR. HODGINS, Q. C.—The plaintiff claims as assignee of a mortgage in respect of certain loans originally made to the defendant Ledyard by the Rent Guarantee Loan Aid and Investment Company. These loans were held to be *ultra vires* of the Company in a suit for the winding up of its affairs: *Walmesley v. Rent Guarantee Co.*, 29 Gr. 484.

Mr. Foster, for the defendants, contended that it was open to him to show that the loan, being beyond the powers of the company to make, could not be assigned or recovered in this action. But I ruled against his contention on the ground that the subordinate court of the Master was not the forum before which such an issue could be decided; for if I entered upon such an enquiry and adjudicated in favour of his contention I would be in effect determining that one of the Divisional Courts

—to which the tribunal of the Master is subordinate—had made a nugatory order of reference. This view is sustained by the judgment of the Supreme Court in *Bickford v. Grand Junction Railway Company*, 1 S. C. R. 696. Mr. Justice Strong, who delivered the judgment of the Court, says, on page 726: “The general practice of the Court of Chancery of Ontario, according in this respect with the practice which prevailed in England before the abolition of the office of Master, is that a question such as this—the invalidity of a mortgage deed—should be raised by the pleadings and adjudicated by the Court on the hearing of the cause. We can find no exception to this cardinal rule of equity procedure, save in some few respects when the general orders of the Court of Chancery have authorized the Master to deal with matters of account which formerly required special directions in the decree, and which have no relation to this case. If the doctrine of the Court of Appeal, [23 Gr. 340,] were to prevail, it is hard to suppose any case in which the Master, under a reference to take the account in a mortgage suit, might not assume the jurisdiction to decide upon the validity of the mortgage deed. If the mortgagors are to be at liberty to say in the Master’s office that there is nothing due on this mortgage deed, because it was beyond the powers of the respondents as a corporation to make it, why should they not also be heard to say there is nothing due because the deed was obtained by fraud. Unless some arbitrary line is to be drawn the right of the Master, under such a reference, to enquire into the validity of the deed, would, according to the doctrine of the Court below, be co-extensive with that of the Court at the hearing. We know of no authority for any such delegation of the functions of the Court to the Master.”

The plaintiff claims to be allowed a loan of \$975, being a part renewal of a note of \$1,000, secured on the lands in question, and other lands mentioned in a receipt dated 29th January, 1875, and which concludes thus: “All of

which securities are deposited as collateral security for the payment of a promissory note dated this day, made by the said T. D. Ledyard payable three months after date to the order of T. D. Ledyard at the Royal Canadian Bank in Toronto, for the sum of one thousand dollars; and if said note is not paid at maturity it shall bear interest at the rate of two per cent per month until paid.

The original note for \$1,000 mentioned in the receipt was taken up by the defendant by a part payment in cash and by a renewal note for \$975. The defendant contends that by this means the original note was paid, and that the plaintiff has now no right to hold the securities for the renewal note. It is true the original paper with the promise to pay the \$1,000 written thereon is not in the plaintiff's possession, but *the debt*, or the unpaid portion of it represented by the renewal note of \$975, and for the repayment of which debt the securities were given, has not been paid. Had the present contention of the defendant been the actual agreement between the parties he should have demanded a re-assignment of the securities at the time of the part payment and renewal on the 6th October, 1875. But he made no such demand, and he has allowed them to be held up to this time; which circumstances may reasonably be assumed to negative his present contention. Besides the case of *Brownlee v. Cunningham*, 13 Gr. 586, is decisive on this point. In dealing with a similar contention Mowat, V. C., said: "I am satisfied if I were so to hold I would be defeating instead of giving effect to the original intention of the parties; and that I shall be carrying out the intention of the original transaction and correctly construing the whole evidence by holding that the mortgage was given to secure the indemnification of the mortgagees, and each of them, in respect, not merely of the first note, but also of any subsequent transaction with the mortgagor growing out of it, whether in the shape of renewals, new notes, or otherwise. The parties have acted throughout as if this was the transaction, and I see no reason whereby I should not give that effect to the mortgage."



Another claim made by the plaintiff is for a cheque drawn by the defendant on the Canadian Bank of Commerce for \$283.85, dated the 10th November, 1875, and still unpaid. This is, by an agreement which I hold to be binding on the defendant, also covered by the securities held by the plaintiff. The defendant contends that as the remedy for this debt is barred by the Statute of Limitations the collaterals cannot be held for it. I find the law to be thus stated in *Banning on Limitations*, p. 16: "The fact that a creditor has collateral security for a simple contract debt will not prevent the debt from becoming barred (as respects other remedies), though he will, of course, retain his lien upon the security." *Higgins v. Scott*, 2 B. & Ad. 413, is referred to as the authority for this—where it was held that though the remedy of an attorney on his bill of costs was barred, he had a lien on the fund recovered by the judgment, though such fund was recovered more than six years from the entry of the judgment.

The plaintiff claims to be entitled to interest at two per cent per month on each of these sums. As to the first mentioned sum the receipt which I have quoted shows that the debt is to bear such interest until paid. As to the second sum, I have come to the conclusion on the whole evidence that there was no agreement such as the plaintiff contends for, and as the parties did not embody their agreement as to interest in writing, I hold as to this debt that the plaintiff is only entitled to interest at the rate of six per cent.

The plaintiff also claims interest from the date of the respective loans, 6th October, 1875, and 10th November, 1875, up to the time of redemption. No claim for arrears of interest is specially made by the pleadings; and in order to obtain more than six years' arrears the question must be raised on the pleadings: *Sinclair v. Jackson*, 17 Beav. 405.

But a more formidable difficulty bars the plaintiff's claim for such arrears. There is no covenant by the defendant to pay interest, and which covenant when secured by deed would have made the plaintiff a specialty creditor

of the defendant in respect of such interest. A mortgagee under an ordinary mortgage deed is in the position of a secured creditor for six years, and of an unsecured creditor for the remainder of the ten years; that is he has two causes of action: an action of foreclosure, and an action on the covenant for arrears of interest.

In the case of *Hodges v. Croydon Canal Company*, 15 Beav. 86, the defendants conveyed their works to a mortgagee to hold until repayment of certain moneys borrowed, and interest; but there was no covenant in the mortgage to repay either principal or interest. The Master of the Rolls held that although the mortgagee could recover the principal within twenty years, yet his remedy for arrears of interest was limited to six years. See further on this: *Brocklehurst v. Jessop*, 7 Sim, 438; *Re Stead's Mortgaged Estates*, 2 Ch. D. 713, and *Henry v. Smith*, 2 Dr. & War. 381. The plaintiff therefore can only recover six years arrears of interest on each of the above loans.

The plaintiff is also entitled to the amount paid by him for taxes to redeem the lands. The original mortgagee had obtained a tax deed of the property; but he was disqualified as a mortgagee from purchasing for his own benefit: *Scholfield v. Dickinson*, 10 Gr. 326; *Smart v. Cottle*, 10 Gr. 59; *Kelly v. Macklem*, 14 Gr. 29; but the money paid by the mortgagee to redeem the lands from taxes is a lien on the land, and the mortgagee had a right to claim the same as a just allowance, with interest at six per cent from the date of payment.

And the plaintiff also claims to be allowed the amount paid by Barrett, the trustee for the mortgagee company, on a judgment against him for calls on thirty shares of the Electric and Hardware Company assigned by the defendant Ledyard to Barrett as collateral security for the original loan. When the stock in this company was assigned to Barrett sixty per cent of it had been paid up, but subsequent calls were made on which Barrett was sued and judgment obtained against him about the 4th April, 1882. Barrett paid this judgment, and the plaintiff now claims to add this to his debt as a lien on the lands.

There is no case made in the pleadings for this claim ; and the plaintiff has not yet obtained any assignment of the shares or of the judgment from Barrett, and Barrett is no party to this suit. The plaintiff's counsel, however, claims that he can procure a formal assignment of the stock and judgment from Barrett.

Apart from other substantial reasons which it is unnecessary to refer to at length, I think I am precluded by the terms of the order of reference from allowing this to the plaintiff as "an amount *due to the plaintiff* in respect of the loans to the defendant Thomas D. Ledyard," or as an amount for which the plaintiff is entitled to a *lien on the land and premises*.

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RYAN V. FISH ET AL.

*Action for dower—Striking out pleas in statement of defence—Reference as to damages without trial of issues on record—Jurisdiction of Master—O. J. A. secs. 47 and 48.*

In an action for damages for detention of dower, defendants pleaded (1) that the lands in question were wild, and plaintiff was not entitled to the sum claimed for damages, if any ; (2) that plaintiff had assigned her claim for damages ; (3) set off for moneys expended in respect of said lands ; (4) that they did not detain, but were always willing, &c.

On a motion in Chambers, after issue joined, for an order directing a reference as to the damages under sec. 47 O. J. A., and upon evidence by affidavit both for and against the truth of the pleas, the Master made an order striking out the 2nd and 3rd pleas, and directing a reference. *Held*, that the Master had no jurisdiction to make the order, and that the issues raised questions that were properly triable only at the hearing.

[June 28th, 1882.—*The Master in Chambers.*]  
[September 15th, 1882.—*Proudfoot, J.*]

THIS was an action in the Chancery Division by Catherine Ryan, widow of Thomas Ryan, deceased, against Robert J. Fish, owner, and Robert Ransom, tenant, of certain lands in Wellesley, county of Waterloo, for dower claimed by plaintiff in said lands, and damages for detention of same since March 29th, 1877. The testator, Thomas

Ryan, died on that day, seized in fee of the lands in question, which he devised to his son Patrick Ryan (*a*). The will made no provision for the widow's dower. Patrick Ryan leased the lands to defendant Ransom for a term of years, and on the 23rd May, 1879, and 12th July, 1880, respectively, conveyed the two parcels to defendant Fish. He had previously mortgaged both parcels to a loan company, making a statutory declaration that the lands were wild, and that there was no lien or charge of any kind upon them. No demand for dower was made by the widow upon him while he was the owner. Her demand on defendants was made March 3rd, 1882. The writ was issued March 22nd, 1882. Defendants appeared, filed an acknowledgment that they were tenants of the freehold, and a consent that plaintiff might have her dower, pursuant to sec. 20, ch. 55, R. S. O., being the Dower Procedure Act. Judgment of seisin was thereupon entered, and the action proceeded for damages for detention, by filing a statement of claim. The statement of defence set up 1st, that when the testator died, the lands were in a state of nature, and unimproved by clearing, fences, or otherwise, for the purposes of cultivation or occupation, and that plaintiff was not entitled to \$1000 for damages or arrears, but to a much smaller sum, if any; 2nd, that plaintiff had assigned to her son, Patrick Ryan, all her claims for damages or arrears, and that Patrick was a necessary party, and the beneficial plaintiff; 3rd, that Patrick Ryan was indebted to defendants for moneys expended by them in respect of said lands; 4th, that defendants did not detain plaintiff's dower, but were always willing, &c. Issue was joined on these several defences.

On June 20th, 1882, *Hoyles*, for the plaintiff, moved on notice, before the Master in Chambers, for an order referring it to the Local Master at Barrie, or to one of the Masters of the Supreme Court, to ascertain and fix a proper sum for damages for detention of the plaintiff's

(a) *Vide Ryan v. Ryan*, 29 C. P. 449, 4 A. R. 563, and 5 S. C. R. 387.

(b) *Vide Ryan v. Fish et al.*, 9 P. R. 458.



dower. He read affidavits by plaintiff, her solicitor, and Patrick Ryan, verifying the pleadings and proceedings so far, and denying the truth of the statement of defence *seriatim*. He cited sec. 47, O. J. A., and contended that, on the pleadings, the whole question was in the discretion of the Master under that section, that it was purely one of amount, and should be disposed of without delay. The truth of the pleas being fully denied, they should be struck out.

*J. King*, (Berlin), for the defendants, read four affidavits in answer verifying the statement of defence. He contended that, at the present stage of the action, the order asked for was not within the jurisdiction, or at least the discretion, of the Master. Defendants made out a strong case for further enquiry. The issues were such as should not be disposed of on affidavits in Chambers; they could not be tried there, or at least should not, as great injustice might be done thereby. It was not a case for the exercise of the Master's discretion under either sec. 47 or 48 of the O. J. A., and the defendants were entitled to have the action fully and fairly tried at the hearing. There was no case for damages: *Linfoot v. Duncombe*, 21 C. P. 484, and *Harvey v. Pearsall*, 31 C. P. 239, but, in any event, the reference should be to the Master at Berlin.

Judgment was reserved, and, on June 28th, the Master gave judgment granting the order asked for, striking out the 2nd and 3rd pleas, and directing a reference as to the damages to the Local Master at Berlin.

From this order the defendants appealed. The appeal was argued before Proudfoot, J., September 4th, 1882.

*Lash*, Q. C., and *J. King*, (Berlin), for appellants. Plaintiffs having taken judgment of seisin, cannot now proceed for damages: *Linfoot v. Duncombe*, 21 C. P. 484, and *Harvey v. Pearsall*, 31 C. P. 239. A demand and refusal are essential to damages, and no refusal is shown here: *Empey v. Loucks*, 8 U. C. R. 374. The order is wrong in striking out the second plea, alleging an assignment, The assignment



is only of the money demand for damages, and this is clearly a good defence: *Rose v. Simmerman*, 3 Chy. 598. Patrick Ryan might be made a party at the hearing, Rule 103. The set off of a money claim by defendants is also a good defence, and the plea as to that was improperly struck out: *Cochrane v. Green*, 9 C. B. N. S. 448; *Agra & Masterman's Bank v. Leighton*, L. R., 2 Ex. 56-65; *Taylor & Ewarts*, O. J. A., p. 36 *et seq.* The truth of these issues was really tried in Chambers, and this should not have been done. They were not questioned in the notice of motion, and, even if they were, defendant's affidavits show that the pleas are true, or at least that they are fair questions to try at the hearing. Then as to that part of the order directing a reference, we say that, with the other issues on the record, no reference should have been directed. Sec. 47, O. J. A., does not apply; sec. 48 is alone applicable, and the order was not a proper exercise of the Master's discretion under that section. In fact, he had no jurisdiction, or at least no discretion, under the circumstances: *Taylor & Ewarts*, O. J. A., p. 91; *Macclennan's* O. J. A., p. 46. As to whether the O. J. A. applies in dower actions: *Glass v. Glass*, 9 P. R. 14.

*Hoyles and Macnee* (Picton) contra. Patrick was no party to the action, and it was a part of the Master's duty to enquire if the plaintiff was entitled to anything for arrears of dower. If Patrick was the beneficiary, he could be made a party in the Master's office; and at any rate the second plea was bad and should not stand. *Street v. Dolsen*, 2 P. R. 306; *VanNorman v. McLellan*, 2 U. C. L. J., N. S. 208, Har. C. L. P. A. p. 137. Hence, the third plea also could not stand. The only question therefore was how much was the plaintiff entitled to, and the order of the learned Master was correct. The following authorities were also cited: *Mostyn v. The West Mostyn Coal and Iron Co.* 1 C. P. D. 153; *Cameron v. Gilchrist*, 43 U. C., R. 512.

PROUDFOOT, J.—The statement of claim is framed apparently upon the suggestion made by the Court in *Harvey v*

*Pearsall*, 31 C. P. 239. But the question here is, not that which was decided in *Linfoote v. Duncombe*, 21 C. P. 484, for here no judgment has been signed on the admission of seisin, nor that decided in *Harvey v. Pearsall*, 31 C. P. 239, for here the plaintiff does not claim dower as well as damages, but only damages, stating in her statement of claim that her right to dower was admitted. The defendants do not admit the right of the plaintiff to damages, they say she is not entitled to so much, *if any*. That cannot be construed into an admission of an absolute right to damages. The second paragraph of the statement of defence, or for shortness, plea, is that the plaintiff had assigned her right to her son. The plaintiff does not reply, as she probably might have done, though an assignee of a chose in action may now sue in his own name, that she was suing as trustee for the assignee, but she takes issue upon it. The third plea is one of set-off against the assignee. Under the Judicature Act the silence of a plea as to any allegation in the action is not to be construed into an implied admission of its truth (Rule 148), and if the order under appeal can be supported as to the reference, it must be on the supposition that the plea contained an admission of liability for damages. But the plea does not seem to me to contain such an admission; and the acknowledgment of seisin does not imply any right to damages. For supposing that right admitted or proved, there might still be a defence that the defendants were always ready to assign the dower. As the plaintiff claims to be suing for herself, the second plea is an answer to her action. It alleges an absolute assignment to the son who is the beneficial plaintiff. If that is true, the plaintiff has no right to sue for herself. And if the second plea be true, then the defendants would have a right of set-off against the assignee under the circumstances set forth under the third plea. The three pleas offer issues on matters which are accepted by the plaintiff. Even if the first plea had admitted the right to damages, it would not follow that the reference should have been made, for the defences in

the other pleas would have rendered it nugatory. So sensible was the Master of this, that although the plaintiff in her notice of motion for a reference did not ask it, yet he made an order striking out the second and third pleas, because, as I am informed, they could not remain with such a reference. I would have supposed that would have been rather a reason for refusing the reference. I have not been informed upon what authority the second and third pleas, upon which issue was joined, were struck out. They cannot be said to be embarrassing pleadings, or scandalous, or tending to prejudice or delay the fair trial of the action, O. J. A. Rule 178, and unless they could be brought within these categories, I am not aware of any authority for striking them out. If they could not be struck out, and if they could not remain on the record with the reference that has been ordered, then the reference was erroneously made.

I allow the appeal, with costs.

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### CAMERON V. ALLEN.

#### *Garnishee—Appeal.*

An appeal does not lie under the Division Courts Act 1880 on a question arising between a primary creditor or plaintiff and a garnishee.

Section 17 of the Act gives the right of appeal to "any party to a cause," but a garnishee is not a "party to a cause;" he is merely a party to the proceedings.

*Beswick v. Bappy*, 9 Ex. 315 followed, but not approved of,

[December 3rd, 1883.—*Cameron*, J.]

THE plaintiff obtained a summons from Osler, J., calling on the defendant and William Noble, garnishee and Messrs. Acheson & Company and Wood & Leggatt made parties by amendment of the summons to the original suit in the Ninth Division Court of the county of Wentworth, for a preceptory mandamus to compel the clerk of that Court to

forthwith furnish the plaintiff with a certified copy of the summons and other proceedings in that Court for the purpose of enabling him to appeal to the Court of Appeal from the decision of the Judge of the said Court refusing to grant a new trial in the case. The following are the material facts upon which the application was made and opposed: The plaintiff's claim against the defendant Allen was for an amount over \$100, but within the jurisdiction of the Division Court, and he obtained in that Court a summons under sections 123 and 133 of R. S. O., ch. 47, the Division Courts' Act, summoning the defendant Allen to appear on the 2nd day of March, 1883, to answer the plaintiff, the primary creditor, and requiring the garnishee, William Noble, to appear at the same time and place to shew whether he owed any and what debt to the primary debtor, Allen the defendant, and why he should not pay the same into Court to the extent of the primary creditors claim in satisfaction thereof. At the time appointed for the trial it appeared that the other parties above named claimed to have a claim under the Mechanics' Lien Act upon the moneys due by the garnishee Noble to the defendant Allen, and the learned Judge amended the plaintiff's summons by adding the parties claiming the lien as parties to the proceedings. There was no dispute by the garnishee that he owed the defendant \$224, and he submitted himself to the direction of the Court as to the party or parties to whom he should make payment. The claim of Atcheson & Co, was over \$100, and that of Wood & Leggatt less. The learned Judge directed judgment to be entered for the plaintiff for the amount of his claim against the defendant Allen, and dismissed his claim against the garnishee, Noble, holding that the claimants Atcheson & Co. and Wood & Leggatt had established their claims under the Mechanics' Lien Act, and directed judgment to be entered against the garnishee Noble for Atcheson & Co. for \$170.02, and for Wood & Leggatt for \$53.98.

This judgment was rendered on the 19th day of June,  
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1883, and on the 30th June the plaintiff applied for a new trial which was refused on the 20th day of July. On the 27th July, the Judge granted an order staying all proceedings for ten days from the 21st July, to allow the plaintiff an opportunity to appeal, and by the order fixed the security to be given at \$50, and directed that such security should be by bond for that amount or by payment of that sum into Court. The plaintiff gave the bond which the learned Judge refused to allow on the ground that no appeal would lie in the garnishee proceedings. The plaintiff then paid \$50 into Court, but such payment was not made until the 9th day of August, five days after the Judge had refused to approve of the bond. On payment of the said \$50 into Court as security for costs, the plaintiff demanded from the clerk a certified copy of the summons and notices endorsed in accordance with sec. 20 of ch. 8, 43 Vict, O.. the Division Courts' Act, 1880. The clerk refused to certify the proceedings on the ground that no appeal would lie in obedience to the direction of the learned Judge to that effect.

*Shepley* supported the summons.

*McKelcan*, Q. C., *Holman*, & *Kittson* (Hamilton) showed cause.

CAMERON, J.—The present application presents two questions for solution: first, does an appeal lie under the Division Courts Act, 1880, on a question raised between the primary creditor or plaintiff and the garnishee? And second, has the plaintiff the right to appeal in this case, the bond not having been approved. and the money in lieu of the bond under the order staying proceedings not having been paid into Court within the time mentioned in the order? If the first question is determined against the plaintiff it will be unnecessary to decide or consider the second. The right of appeal is given by section 17 of the last mentioned Act, to any party to a cause, as defined by section 34 of the County Court Act, which provides that the terms "party to a cause" and "appellant" shall include "persons suing



or being sued in the name of others, though not mentioned in the record" and persons in whose behalf or for whose benefit any suit is prosecuted or defended as well as parties named in the record.

The garnishee under the Division Courts Act is not a party to the cause though he is a party to the proceedings. The cause *qua* cause is only between the plaintiff and defendant, and the garnishee proceedings are grafted thereon and collateral thereto. The suit is not defended in any sense in the garnishee's behalf. He is merely called upon to show cause why, in the event of the plaintiff recovering judgment against the primary debtor, he should not pay the amount of any debt due from him to such primary debtor, or a sufficient part thereof to satisfy the claim of the plaintiff the primary creditor, and has nothing whatever to do with the question involved in the cause. He is not brought, as was contended, on behalf of the plaintiff within the jurisdiction of the appellate tribunal under the words, "as well as parties named in the record." Those words are used to denote the parties to the suit proper, as distinguished from persons not named but in whose behalf the suit is brought or defended, and not for the purpose of extending the right of appeal to a party who happens to be mentioned in the record for a collateral purpose to the direct issue between the parties the plaintiff and defendant proper, and are no more extensive in their operation than the words "either party in any cause," which in *Beswick v. Bappy*, 9 Ex, 315, were held merely to mean the original party in an action. In *Mason v. Worral Highway Board*, 4 Q. B. D. 459, it was held there was no appeal from the garnishee order made by a County Judge, and Cockburn, C. J., in giving judgment, used the following language, which I think covers the present case as expressing his opinion. "I am disposed to regret the construction placed by the Court upon the words 'either party in any cause,' in *Beswick v. Bappy*, where it was held that they must be taken to mean the original party to the action. I think that a liberal inter-

pretation ought to be put upon the words giving a right of appeal, and it might well be said that an order made incidently to the action is made in the action, but we are bound by *Beswick v. Bappy*, and the cases following it, for I think they cannot be distinguished from the present case, and that they shew that the right of appeal does not extend to an order between the plaintiff and a third party who is brought into the proceedings." I do not think it is possible to distinguish between the terms "any party to a cause," and "either party in a cause," and there being an express decision binding upon me and the Courts of this Province, that the latter words do not cover or extend to a third party brought into the proceedings as a garnishee, I cannot extend the term "party to a cause" to a garnishee. I quite regret that I am forced to adopt this restricted limitation of the right of appeal, because, where the garnishee is the party who feels aggrieved, a serious injustice might be done by denying him the right of appeal, where he is made collaterally a party to the suit that he would have had if the primary debtor had sued him. It seems absurd to say, that in an action or proceeding between A. B. & C. D., either has the right of appeal while in an action brought by E. F. against A. B., C. D., who is brought in collaterally and contests against E. F., this very same question of liability to pay A. B., he has no appeal from an adverse decision. If I did not feel myself precluded by authority, I should hold that the change of party or form of proceedings could not be permitted to deprive a party of his right of appeal. That the substance of the right of the party should be regarded and not the form in which it was claimed or presented.

If Allen had assigned his claim against Noble to Cameron and Cameron had sued either in his own name or Allen's, either Cameron or Noble would have had the right of appeal. By operation of the 124th section of the Division Courts' Act the law virtually assigned the debt due or claimed to be due from Noble to Allen, to Cameron, subject to any higher rights that other parties might have. Then

why, in justice, should the parties be deprived under the assignment by operation of law of the rights they would have had in case of a voluntary assignment. I can only say the Legislature has provided a new remedy for the satisfaction of debts without adequately protecting the contestants in their rights in the enforcement or resistance of such new remedy. I regret that the clerk of the Ninth Division Court did not certify the proceedings in order that the Court of Appeal might have decided the question of jurisdiction. It would be much better that it should determine the question than that a Judge, whose decision is open to review and to be overruled by it, should be called upon to define whether a particular case is within its jurisdiction or not.

As I am against the applicant on the question of his right to appeal, I express no opinion upon the other point raised.

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PERKINS V. MISSISSIPPI AND DOMINION STEAMSHIP  
COMPANY (LIMITED.)

*Cause of action—Breach of contract—Jurisdiction—Rules 45-8 O. J. A.—  
Undertaking of solicitor to prove cause of action within jurisdiction.*

In an action for damages for breach of contract by the defendants, a corporation in Liverpool, England, in not delivering certain machinery at the railway station nearest to Ottawa, the writ and statement of claim were served on the defendants' agent in Montreal, and under Rule 48 O. J. A. the plaintiffs now applied for an order allowing the service, on the ground that the case was one within Rule 45. The affidavit made and filed by the plaintiff's solicitor set out.

"2. The paper writing shown to me, marked Exhibit A, is a true copy of the statement of claim delivered in this action ;"

"3. This action is brought to recover damages for breach of contract on the part of the defendants in not delivering the machinery, in the statement of claim mentioned, at the railway station nearest to Ottawa under the terms of the contract."

But the affidavit did not state that the deponent knew the fact, either of his own knowledge or on information and belief, nor that the defendants ever entered into a contract with the plaintiff, and undertook to deliver the machinery at the railway station nearest to Ottawa.

The bill of lading containing the contract in question provided *inter alia* "that the machinery in question is to be delivered at the port of Montreal unto the G. T. R. Co., by them to be forwarded upon the conditions above and hereinafter expressed, thence per railway to the station nearest to Ottawa, and at the aforesaid station delivered to order \* \* \* freight \* \* \* to be paid by the consignees." "That the goods are to be delivered from the ship's deck, *when the shipowner's responsibility shall cease. Through goods sent forward by rail are deliverable at the railway station nearest to the place named hereafter.*" "That any loss, damage, or detention of goods on this through bill of lading for which the carrier is liable must be claimed against the party only in whose possession the goods were when the loss, damage, or detention occurred."

*Held.*—1. That the affidavit did not afford the proof required under Rule 48 : 2. That the bill of lading showed no contract on the part of the defendants to deliver at Ottawa, or the nearest station to Ottawa ; nor any contract, the breach of which was made in Ontario, because, if there was such a contract in the bill, force and effect could not be given to the stipulations in it that the shipowner's responsibility should cease when the goods were delivered from the ship's deck, &c., and hence, though leave would be given, to file further affidavits ; such leave was therefore unnecessary.

And, again, if there was a contract, and its terms expressly exempted the defendants from any and all liability for damage for any loss, etc., arising beyond their line, no damage for a breach in this province would result to the plaintiff, and though technically within Rule 45, sub-sec. c., discretion should (if any exist) be exercised in refusing to allow the service.

In cases of this kind an order allowing service should not be made on an undertaking of the plaintiff's solicitor to prove a cause of action, &c., within the jurisdiction, as it shifts the onus of proof to the plaintiff, and requires him to conduct, it may be, a long and expensive litigation to procure a decision on a point properly raised at the commencement of the action.

[December 21, 1884.—*Rose, J.*]

THIS was an appeal and cross appeal from an order of Mr. Dalton, Q.C., Master in Chambers, dismissing a motion on behalf of the defendants for an order setting aside the writ of summons, statement of claim or the copies and service thereof upon John Torrance as agent in Montreal for the defendants, and granting a motion on behalf of the plaintiff allowing the service of the same writ of summons and statement of claim.

*Lefroy*, for the plaintiff.

*Richards*, Q. C., for the defendants.

The facts appear in the judgment.

ROSE, J.—The questions submitted for decision were :

1. As to whether the material produced before the Master by the plaintiff was such as should have satisfied the Court or Judge that the case was a proper one for, service out of the Province, under rule 45 O. J. A.

2. As arising out of this, whether the bill of lading set out in the statement of claim served shewed any contract on the part of the defendants to deliver the machinery in question at the railway station nearest to Ottawa, the non-delivery at Ottawa being the breach complained of, and

3. As to the right of the plaintiff to be relieved from an undertaking which he was required to enter into as a condition of obtaining the order, the undertaking being, as I understand, to prove a breach within Ontario, of the contract in question.

The material before the Master was an affidavit of the plaintiff's solicitor, in which he states in clause 2 :—"The paper writing shewn to me and marked as exhibit A is a true copy of the statement of claim delivered in this action. 3:—This action is brought to recover damages for breach of contract on the part of the defendants in not delivering the machinery in the statement of claim mentioned, at the railway station nearest to Ottawa under the terms of the contract."



There is in the affidavit no statement that the deponent has any knowledge of the facts upon which the plaintiff relies, either of his own knowledge or on information and belief. The affidavit does not state that the defendants ever entered into a contract with the plaintiff, that they undertook to deliver the machinery in question at the railway station nearest to Ottawa, or that they made default in so doing. In fact, the clerk who was entrusted with the copying out and filing the statement of claim could have safely sworn to all that is contained in these clauses. The affidavit does not conform to the requirements found in the judgment of James, L. J., in *Great Australian Gold Mining Co. v. Martin*, 5 Ch. Div. 11, to to which reference may be had.

In my opinion such material does not afford the proof required under rule 48, O. J. A.

As, however, I would allow a further affidavit to be put in to supply the defect, if it could be supplied, and as the parties were both desirous that the other questions should be considered, I do not rest my decision on this ground alone.

As the affidavit, by reference to the statement of claim, incorporates the bill of lading, I read it to see whether the defendants ever did undertake or agree to deliver the machinery in question at the railway station nearest to Ottawa, for if they did not, then there is no contract whereof there is a breach within Ontario, this being the ground upon which the plaintiff relied to entitle him to his order allowing service. That I am justified in examining the material for such a purpose is clear; see *The Great Australian Gold Mining Co. v. Martin*, 5 Ch. Div. 11; *Preston v. Lamont*, 1 Ex. Div. 361.

The bill of lading is signed by "W. Wales, agent for G. T. R. Co. of Canada and Mississippi and Dominion S.S. Co." and is dated at Liverpool, England. It provides that the machinery in question is to be delivered "at the port of Montreal, unto the G. T. R. Co., and by them to be forwarded upon the conditions above, and hereinafter ex-

pressed, thence by railway to the station nearest to Ottawa; and at the aforesaid station delivered to order \* \* freight

\* to be paid by the consignees. That the goods are to be delivered from the ship's deck where the ship owner's responsibility shall cease. Through goods sent forward by rail are deliverable at the railway station nearest to the place named hereafter. That any loss, damage or detention of goods on this through bill of lading for which the carrier is liable must be claimed against the party only in whose possession the goods were when the loss, damage, or detention occurred."

Mr. Richards contended that this was a contract entered into by the S.S. Co. and R.R. Co. with the consignees; the S.S. Co. agreeing that they would carry to Montreal and deliver to the R.R. Co., and the R.R. Co. that they would carry from Montreal to Ottawa. It may be that this is so, and that the plaintiffs can look to the defendants, the S.S. Co., for carriage to Montreal only, and that their duty ends at that port, and that the contract is with the G. T. R. for carriage from Montreal.

This form of contract or a similar one was considered in *Moore v. Harris*, L. R. 1 App. Cases p. 318, but it does not there appear whether the contract was signed on behalf of both carriers. In that case, p. 327, Sir Montague E. Smith, in delivering the judgments of their Lordships, says: "On the other hand it was pointed out that it is provided that the goods are to be delivered from the ship's deck where the ship's responsibility shall cease, and this delivery is to be to the railway company; but although the liability of the ship for the subsequent damages there ceases, it would be the duty of the ship to contract with the railway company to carry the goods on to Toronto."

His Lordship was there apparently of the opinion that the duty of the S.S. Co. was not to deliver at Toronto, but to contract with the G. T. R. Co. at Montreal to carry the goods on to Toronto. The breach of duty would be the non-delivery to the G. T. R. at Montreal, or not contracting at Montreal with the G. T. R. It may be that the bill of

lading in question is signed as it is to meet the decision in *Moore v. Harris*, for the bill of lading is a contract with the G. T. R. to take the goods at Montreal and carry them to Ottawa.

I am of the opinion that the bill of lading shews no contract on the part of the defendants to deliver at Ottawa or the nearest station to Ottawa, nor any contract the breach of which was made in Ontario. Reading the bill of lading as part of the affidavit it thus appears, if I am right in my opinion, that the deponent could not have sworn that the defendants contracted to deliver the machinery at the railway station nearest to Ottawa, and thus the omission in the affidavit seems to be one that could not be supplied by allowing a further affidavit to be filed.

If the contract is, as was contended by Mr. Lefroy, one which bound the defendants to deliver the goods at Ottawa, I do not see how force and effect are to be given to the stipulations that the ship owners' responsibility should cease when the goods are delivered from the ship's deck, or to the provision that any loss, damage, or detention \* \* must be claimed against the party in whose possession the goods were when the loss, &c., occurred.

If the damage is occasioned by the neglect to deliver to the G. T. R. this breach was made in Montreal, if occasioned by neglect or otherwise while in the possession of the defendants, such breach could not have been made in Ontario as the company's line ends at Montreal, and unless, therefore, the defendants be held liable for some breach of duty by the R.R. Co. I cannot see how any breach could be made in Ontario, and against such liability they have specially contracted.

Then, again, assume that this was a contract by the defendants to carry the entire distance, and that by the terms of the contract the plaintiff expressly exempted the defendants from any and all liability for damages for any loss, &c., arising beyond their line, as in *Zunz v. S. E. R. W. Co.*, L. R. 4 Q. B. p. 543; *Coxon v. G. W. R. W. Co.*, 5 H. & N. 274; *Collins v. The Bristol and Exeter R. W. Co.*, 11

Ex. 790; *S. C.*, 7 H. of L. 194, should service be allowed so as to subject the defendants to an action in this country for the breach of a contract, from which breach no damage can flow to the plaintiff? It may be said that such a case comes within the literal wording of sub. sec. (c) rule 45, but if any discretion exists it should be exercised in refusing to allow the service

In *Diamond v. Sutton*, L. R. 1 Ex. 130, the Court seemed to think there was such a discretion, and bound the plaintiff by an undertaking which in their view prevented the abuse of its process. See also *Great Australian Gold Mining Co. v. Martin*, 5 Ch. Div. 11, where James, L. J., says: "It is admitted on both sides that the Court must have a discretion in the matter of the service of a writ abroad."

So far then as I have any discretion I exercise it in not allowing, or disallowing the service.

Mr. Lefroy on the cross appeal urges that he should be relieved from his undertaking. Upon looking at the order it does not clearly appear that an undertaking was given to prove a breach within Ontario. The clause is as follows: "And it is further ordered that the costs of and incidental to this application, and the further costs to be incurred in this action abide the event of the plaintiff proving at the trial of this action that a breach of the contract sued on herein took place within this Province.

This in terms only extends to the costs of the action.

Mr. Lefroy urged that though the practice prior to the Judicature Act might have entitled the defendants to such an undertaking, such was not now the practice. He referred to *Preston v. Lamont*, *supra*, where Amphlett, B., in giving judgment says: "A Judge ought not to make an order for service out of the jurisdiction, unless he is satisfied that the action comes within the instances given in Order XI., Rule 1. The decision of the Judge at Chambers can be contested on appeal, and if necessary, in the House of Lords. There is convenience in this, because it is a speedy and inexpensive mode of determining that question before any expense is incurred upon the merits of the action."

In my opinion an order for allowance of service should not be made on an undertaking of the plaintiff's solicitor to prove a cause of action, &c., within the jurisdiction. This shifts the onus from the defendants to the plaintiff. and requires the plaintiff to conduct, it may be, a long and expensive litigation before he can procure a decision on a point of objection raised at the commencement of the suit.

The defendant raises the question. If the Court or Judge think there is jurisdiction he must either be bound by such decision, or appeal. If he succeeds in his contention, the suit is at an end; if he fail, the plaintiff may safely proceed to have the other matters in dispute tried.

I think the plaintiff may well decline to give such an undertaking, and then a decision *pro* or *con* must be given.

It is not necessary to determine whether I have power to relieve from such an undertaking—in the view I have taken of this case—as I must hold that the order of the Master must be reversed, the motion to allow service dismissed, and the motion to set aside service allowed. The defendants should have their costs of this motion and of this appeal. Appeal of the defendants allowed, with costs. Cross appeal of the plaintiff disallowed, with costs.

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## CLARK V. ST. CATHARINES.

*Security for costs—Action on behalf of others—Financial incompetency of plaintiff.*

Security for costs was ordered in an action brought by a ratepayer for himself and the other ratepayers to restrain the delivery by the corporation of certain debentures to a railway company, where it appeared from the examination of the plaintiff that he was financially incompetent to pay the defendants' costs, and was only interested to an insignificant extent; and where he swore that he expected certain persons named to pay his costs and to protect him should the case go adversely, that he did not want to spend any money on the prosecution of his own right in the matter, and that he did not know who instructed the plaintiff's solicitor.

[January 12, 1884.—*The Master in Chambers.*]

THIS was an action by a ratepayer on behalf of himself and all other ratepayers, to restrain the City Council from issuing certain debentures which had been voted by the ratepayers, on the ground that the conditions were not being complied with. The defendants moved for security for costs on the ground of the plaintiff's want of means, and pending the motion, an order was obtained under Rule 285 for the examination of the plaintiff. His examination disclosed that he was suing in his right as a ratepayer, but that he was personally indifferent to the success of the suit, that he had been put forward by others who had agreed to indemnify him from expense, that he expected to pay no part of the costs, and that he was possessed of little or no means.

*Plumb*, for the motion.

It is admitted that poverty is no ground for asking for security from a person prosecuting his right in Court, but where such person assumes a representative capacity he should be ordered to give security if not financially competent to pay costs of the suit if awarded against him. The only exception to this rule is the case of a next friend of an infant. It is not extended to the next friend of a married woman who must be a person of substance, and the same principal should be applied to a person suing on

behalf of others who are *sui juris*. The evidence shows that the plaintiff is practically insolvent, and that he has been put forward by others: *Mason v. Jeffrey*, 2 Chy. Ch. R. 15; *Pendry v. O'Neil*, 7 P. R. 52; *Goatley v. Emmott*, 15 C. B. 291; *Perkins v. Adcock*, 14 M. & W. 808; *Elliot v. Kendrick*, 12 A. & E. 597; *Ball v. Ross*, 1 M. & G. 445; *Lush's Pr.* (3rd ed.) p. 932.

*Hoyles, contra.*

THE MASTER IN CHAMBERS.—I certainly feel some difficulty in this case. I have been referred to a number of cases which I have read with several others, and the result of my consideration is, that I think I ought to order security for costs.

The plaintiff is a ratepayer of St. Catharines, and the suit is brought for himself and the other ratepayers, to restrain the delivery by the corporation of certain debentures to a Railway Company, pursuant to a by law passed some two years ago—(the pleadings are not before me). I take it to be the case that the plaintiff has a legal right as a ratepayer to bring this suit. As to the amount or value concerned in that right it is to him very small; but as the abstract right does exist in him, I should not feel at liberty to make the order for security for costs, were it not for the reasons I state further on. The motion is made on the ground that the plaintiff is financially incompetent to pay the defendant's costs in this suit, if the case should be decided against him. I think that this fact is substantially shown by the plaintiff's examination. Then the defendants further say that the plaintiff is in reality not suing for himself to enforce his own right, but is put forward by others who are more substantially interested, and they urge that this also is proved by the plaintiff's examination.

The plaintiff swears on his examination, after stating that he had spoken to several parties whom he names, that he thought some time ago that if no one else moved in the matter he would do so, and he goes on to state his circumstances as to property, which seem to me to show him un-

able to pay the costs should the case go against him. He says that he has made no arrangement whatever as to the costs—has not considered the question—that he expects the other named parties to pay his costs, and to protect him should the case go adversely, that he has not been asked to contribute towards costs, that upon his being required to come to Toronto the solicitors paid his expenses for him, which he, the plaintiff, does not propose to pay back. He expects that whatever expense he is put to the parties he has named will pay back to him, that it is sufficient if he gives his time, and he uses this language which is the most distinctive of anything on the examination as to his real position. "I don't want to spend any money on the prosecution of my own right in the matter." He does not know who instructed the plaintiff's solicitor, and has not been asked to contribute towards costs. So he could not himself have instructed the solicitor.

From all this it is obvious that the plaintiff is put forward by others (which of itself might not be enough), but as he says, he does not wish to spend any money on the prosecution of his own rights in the matter, and evidently thinks he is not doing so. Then it is obvious that had he not been put forward by others this suit would not have been brought by him. His own interest is insignificant in amount, while that of those he names is much more considerable, and it is for them manifestly that the suit is brought. It seems to me therefore in the spirit of the cases that the plaintiff should be required to give security. That the parties who are standing behind may not be enabled to take all the chances in their favor, and escape all liability to the defendants, should the defendants succeed in the suit. I think this is so upon the authorities, upon the peculiar admissions in the plaintiff's examinations. See *Lush's Practice* 3rd ed. 932. And when it goes beyond the nice discrimination of precedents, the honesty of the case is very apparent.

*Order for security for costs.*

## CLARKE V. LANGLEY.

*Objections to title—Amendment—Jurisdiction of Master—Mistake of purchaser's solicitor—Additional objections.*

By an agreement for the sale of certain land, the vendor was to give a good marketable title of which the purchaser was to satisfy himself at his own expense, and was not to call for any abstract of title, deeds or evidences of title other than those in the vendor's possession. Subsequently on a reference in a suit by the vendor for specific performance, the defendant filed three objections to the title having reference to a small portion of the land, which were answered by the plaintiff, and the reference was proceeding when the defendant applied and obtained from the Master leave to file other objections. On appeal, PROUDFOOT, J., *Held*, that the Master in ordinary had no jurisdiction to grant such leave, but on a subsequent application to the Court he gave the leave required on terms.

[June 29, 1883,—*Mr. Hodgins*, Q.C.]  
[November 28, 1883.— }  
[January 19, 1884.— } *Proudfoot*, J.]

THIS was an appeal in a specific performance suit from an order of the Master giving the defendant, a purchaser, leave to make further objections to the title of the plaintiff after having made one set of objections which were answered.

The agreement was made the 6th December, 1882, and by it the vendor was to give a good marketable title; the purchaser was to satisfy himself of the title at his own expense, and not to be entitled to call upon the vendor for any abstract or any title deeds, or evidences of title other than those in his possession. If the title was not satisfactory to the purchaser he was to notify the vendor within two weeks from date of agreement, and if the objections were reasonable the vendor was to have the option of satisfying them or calling the bargain off.

On the 4th January the defendant's solicitors objected to the title in regard to a street which would take a small piece 16x18 feet off the land sold, under a deed of 21st May, 1842. After some time spent in discovering that deed, the objection was answered on the 24th February.

The defendant took no notice of the explanation, and the plaintiff brought this action for specific performance on the 20th March. On the 10th April the defendant put in



his defence, admitting the contract and expressing his willingness to carry it out if the plaintiff would give a good marketable title to the property.

On the 25th April a judgment for specific performance was given, and it was referred to the Master to inquire whether a good marketable title could be made having regard to the agreement for sale.

In proceeding in the Master's office no abstract of title was brought in, but on the 28th May the defendant filed three objections, in which reference to a deed was made apparently by its number on the Registry, and all having reference to the title to the small portion of the land sold, 16x18 feet, and reserving no leave to make further objections.

These objections were answered by the plaintiff on the following day, the 29th May.

The defendant professed not to be satisfied with the answers, and plaintiff was proceeding with the reference when the defendant applied for leave to deliver further objections.

*H. D. Gamble*, for the plaintiff.

*Langton*, for the defendant.

MR. HODGINS, Q. C.—This is an application for leave to amend the objections to title filed pursuant to directions given by me on considering the judgment. I am bound by the spirit, if not the letter, of the Acts R. S. O. ch. 49 sec. 8 and ch. 50 sec. 270 to make all such amendments of the proceedings in my office as may seem necessary for the advancement of justice, the determining of the rights and interests of the respective parties, and of the real question in controversy between them, whether the necessity for such amendment is or is not occasioned by the defect, error, act, default, or neglect, of the party applying to amend. See also O. J. A. rules 464, 474.

*Tildesley v. Harper*, 10 Ch. D. 393, shews the principles which are to govern in allowing such amend-



ments. Bramwell, L. J., said: "I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*; or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise." Thesiger, L. J., added: "The object of the rules is, to obtain a correct issue between the parties, and when an error has been made, it is not intended that the party making the mistake should be mulcted in the loss of the trial." In this case the application appears to be *bona fide*; and as the case now stands no injury or injustice will be inflicted upon the opposite party by the amendment which cannot be compensated for by costs.

In *McManus v. Little*, 3 Chy. Ch. R. 263, the present Chancellor, when Master, in proceeding on a reference as to title, under G. O. 390-3, held the abstract of title to be insufficient, and directed it to be amended, (see p. 269); and if the abstract is amendable in the Master's office, so are the objections to title, for G. O. 395 provides that "the like course is to be followed upon such objections or requisitions as is prescribed by Orders 390, 391 and 392 in relation to the abstract." But in this case, as the contract excludes any demand for an abstract of title, the reference was brought before me under G. O. 217, under which, in the presence of both parties, I gave directions for the delivery of objections to title, and for the proceedings thereon in my office; and this order enables me to add to or vary such directions as may be found necessary. See also G. O. 240. The affidavit filed satisfies me that the case comes within the rule laid down in *Tildesley v. Harper*, 10 Chy. Div. 393, and the amendment is therefore allowed on payment of costs.

The plaintiff appealed from the decision of the Master.

1. Because the Master had no authority to permit additional objections to be filed, as he had to deal with the

requisitions on title and on them alone. 2. And because the defendant having made one objection, it was a waiver of all others.

*Moss, Q.C., and H. D. Gamble, for the appeal.*

*Langton, contra.*

PROUDFOOT, J.—The mode of procedure upon a reference as to title in ordinary cases is very clearly explained in *McManus v. Little*, 3 Chy. Ch. R. 263. The inquiry in this case, however, has to be modified by regard being had to the agreement of the parties, and the General Orders on the subject 390 *et seq.*, are subject to the terms of the agreement.

The agreement exonerated the plaintiff from the liability of preparing an abstract. And I think the Master might have required the defendant to prepare one. He did not do so, and none was brought into his office, but the defendant files objections to the title. All the preliminary objections to the abstract are therefore out of the question, and the inquiry will be confined to the second class of objections, those to the title, which are dealt with in *McManus v. Little*, 3 Chy. Ch. 267, by the present Chancellor, then Master, where he says : “ If no such objections are made at all, then the abstract is accepted as sufficient, in the sense of a satisfactory title being shown. If one or more such objections are served within the seven days, then the abstract is open as to these, but is to be deemed accepted as sufficient as to all other objections not raised within the time. That is I think the fair meaning of the order. If the parties then cannot be at one as to these objections, they come before the Master upon his warrant, and he will determine all questions upon the abstract. All what questions? Manifestly those upon which the parties are disagreed, and upon which the purchaser is dissatisfied. Every possible objection is not then open to the purchaser, as was here contended.”

In the present case, the defendant can make no objection

for want of an abstract. If one were required, it was his duty to prepare one. He did not desire one, and made objections to the title. These were answered, and if not satisfactorily answered the Master would decide. And the case just cited shews that the title is to be deemed complete except in so far as affected by these objections. I do not find anywhere in the General Orders a power in the Master to relieve the defendant from the effect of this waiver. It certainly is not embraced in the powers of the Master under Reg. Gen, 220.

From Mr. Maclellan's affidavit it would appear that the first set of objections may have been filed by mistake, and were not so full as they ought to have been through the error of some one not acquainted with the title. This may perhaps afford a ground for an application for relief to the Court or a Judge, but it is not within the competence of the Master to deal with.

I think the Master's ruling wrong, and it must be reversed, with costs, but without prejudice to any application the defendant may be advised to make.

The defendant then applied to the Court for leave to file the objections.

*Langton*, for the defendant.—There has been a miscarriage through mistake of a clerk, (see *Bamall v. Walker*, 1 T. & W. 168), and the purchaser, upon compensating vendor by payment of costs, should be placed in the position he was when the limited objections were delivered on 28th May. He should not be compelled to take the property, if the objections he now makes cannot be answered. He has applied before the objections filed have been adjudicated upon, saying that all the matters disputed have not been raised and asks to be allowed to raise them. The matter stands on the same footing as amendments of pleadings, see *Tildesley v. Harper*, 10 Ch. D. 393; *Claparede v. Commercial Union*, 32 W. R. 151.

[PROUDFOOT, J.—Has not the purchaser waived theri ght

to deliver objections to the whole property by delivering objections directed to a small portion only?]

*Langton*.—No, he having applied to supplement his objections before they have been passed upon. *McManus v. Little*, 3 Chy. Ch. R. 263, does not so decide. It merely decides that the Master will not consider the whole title but merely the objections, the parties bring before him. Objections not brought before him before the time for adjudicating upon the matter, would be waived.

*Moss*, Q.C., contra. The objections taken on 28th May, were the same as those taken before suit, and it is not open to defendant to take any others, having reference to the terms of the contract which contemplate all objections being taken at once which are intended to be taken. The decree does not throw the matter entirely open. The enquiry is ordered, having reference to the contract (see *Upperton v. Nicholson*, L. R. 6 Chy. Ap. Ca. 436). The delivery of objections to part is a waiver of all others: *McManus v. Little*, 3 Chy. Ch. R. 263.

The first intimation that any others are intended is in June, being after decree, whereas if plaintiff had supposed any such objections could be taken, he might never have brought his action. He might under the contract have withdrawn them without publicity, but if he withdraws now after a suit commenced, a cloud is thrown upon his title.

The objections are not such as should be allowed; they are not fatal objections, but merely involve expense, calling for productions of deeds which under the contract, we are not bound to produce. The objection as to the sewer was known before the contract was made, and the purchaser should not be entitled to rely upon it. If allowed to make these objections, the vendor should still have his option of calling the bargain off.

*Langton*, in reply.—The plaintiff must be taken to know that after decree we were not bound to rely only on the objections made before action. Any objections might have been taken after the decree on 28th May: *Tesiurgeon v.*



*Martin*, 3 M. & K. 255; *Curling v. Austin*, 2 Dr. & Gu. 129; *Upperton v. Nicholson*, L. R. 6 Chy. Ap. Ca 436. All we are asking now is to be placed in the position we were in on 28th May. If we had then filed the objections, we now wish to file, the plaintiff would have been bound to meet them; if he had then withdrawn, he could not have done so with any less publicity than he now withdraws.

The objections do not call for production of deeds, but say merely that deeds, not being produced and their contents not appearing in the registered memorials, the purchaser can obtain no information, and no root of title appears.

PROUDFOOT, J. —I think the defendant should have leave to file objections to the title in addition to those he filed on the 28th May, 1883.

From the course pursued by the solicitors for the defendant, the number of persons, principals and clerks, who from time to time had the management of investigating the title for the defendant, it seems that the proper steps were omitted to secure a proper investigation of the title till after the 28th May. The explanation given by Mr. Maclellan, that on first taking up the matter and finding an objection apparently fatal, viz: to the piece 16x18 feet at foot of lane, he had not thought it necessary to go further, is probably the reason for the subsequent defective proceedings. Mr. Maclellan swears he had no intention of confining himself to the one objection. The management of the case then passed into other hands, and finding the one objection previously made, it seems to have been thought there was no other, hence the objections or rather objection of the 28th May, (for the three objections of that date all refer to the small piece 16x18 feet at the foot of the lane) was confined to it. I do not think that under these circumstances I should hold the defendant bound to accept a title that may be defective.

The mistake of the defendant's solicitors has been prejudicial to the plaintiff, for had all the objections now sought



to be raised been made in January when the first was made, or even in May when repeated, the plaintiff might have availed himself of his option under the contract of abandoning the sale. He must still retain that option, and if he shall now choose to exercise it the defendant must pay all the costs of suit after the 28th May, the costs prior to that will depend upon the fact whether the objection then made was fully answered, and will be disposed of on a substantial application.

The form of the proposed objections to the title was objected to, as asking for the production of deeds, which by the contract the plaintiff was not bound to produce. I think this is a mistake, they do not require the production of the deeds, but say that the deeds not being produced they are not aware of their contents, &c. The 11th objection is in reference to the sewer. It appears that the defendant knew of this before the bargain by communication with the plaintiff, and the deed relating to it was registered and known to his solicitors before the 4th January, 1883. This should not be allowed as an objection fatal to the title. The plaintiff should be at liberty to shew that under the circumstances it was only matter for compensation.

And I think under the circumstances the 13th should not be allowed.

The defendant must pay the costs of this application.

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## RE DUMBRILL.

*Lunacy—Husband and wife—Separate estate—Creditors—Costs.*

A petition was presented by the husband of D. to declare his wife a lunatic which was opposed by her.

Pending the hearing of the petition D. assigned her separate estate for the benefit of her creditors.

The Court dismissed the petition.

D.'s solicitor presented a petition for taxation of D.'s costs, and for payment by the assignee in priority to the claims of the creditors.

*Held*, that the costs of opposing the petition might be classed as necessities which the wife is liable to pay out of her separate estate, and for which that estate is liable in the hands of her assignee, but that they could not be put on the footing of maintenance. Such costs should be paid ratably out of the assets, and costs subsequent to the assignment should not rank in competition with creditors before the assignment.

[February 4, 1884. —*Boyd*, C.]

A petition to the Court to declare Augusta Dumbrell a lunatic, was presented, first on the 8th October; afterwards on the 15th, 22nd, and 29th October, and finally argued on the 5th November, 1883, and opposed by the alleged lunatic. The petitioner was her husband.

Proudfoot, J., dismissed the petition on the 12th of November, 1883.

Pending the hearing of the petition, Augusta Dumbrell made an assignment of her separate estate for the benefit of her creditors.

*Lefroy*, for the solicitor of Augusta Dumbrell, moved for an order directing the costs of opposing the petition to be taxed between solicitor and client, and paid to the solicitor by the assignee, in priority to the claims of creditors. He referred to *Pope* on Lunacy, p. 204; *Williams v. Wentworth*, 5 Beav. 325; *In re Pink*. 23 Ch. D. 577.

*Shepley*, for the assignee for the benefit of creditors, urged that the costs could not be paid in priority to the creditors' claims, as the greater portion was incurred after the assignment. He referred to *Re Meares*, 10 Ch. D. 552.

BOYD, C.—The authorities shew that if a lunatic's estate prove insolvent, provision is usually made for his maintenance before the claims of creditors are provided for but these cases do not apply here for two reasons—first, the estate is not being administered as in lunacy, and second, the costs of opposing the application to have the wife declared a lunatic cannot be put upon the footing of maintenance, that being absolutely necessary for the sustenance of physical life. These costs may be classed as necessities which the wife is liable to pay out of her separate estate, and for which that estate is liable in the hands of her assignee. The fact of that assignment being made, and this relief sought as against the creditors thereunder affirms the competency of the assignor to transact business, thus leaving the rights of the solicitor in no higher position than if he sought to recover against a married woman in ordinary circumstances. Her rights would then depend on the contract express or implied between client and solicitor.

Indeed, it is conceded that the costs properly incurred should be paid out of the amount in the assignee's hands *pari passu* with the creditors at large. I can give no other order than one to refer it to the Master to tax such costs, and that the amount be paid ratably out of the assets.

Costs of taxation will be dealt with under the statutory provision. Costs subsequent to the assignment cannot rank in competition with creditors before the assignment. The assignee's costs can be paid out of the fund. Upon the law generally in addition to the cases cited, reference may be made to *Re Marman's Trusts*, 8 Ch. D. 259.

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## MILES V. ROE.

*Dominion election—Penalties—Wilful delay—Dismissal of action—Uncontradicted charges of bribery—Costs.*

The acts of bribery complained of were committed between the 13th and 23rd of June, 1882. The writ was issued on the 12th June, 1883, and was served on the defendant on the 27th November thereafter. The defendant, on the 30th November, moved to dismiss the action for wilful delay in prosecution under 39 Vic. ch. 9.

The plaintiff's solicitor swore that he was also solicitor for the petitioner in the Lennox election petition, at which election the acts of bribery complained of were alleged to have been committed, and in order not to endanger the success of that petition it was deemed advisable not to serve the writ until that petition was disposed of, which, on account of objections to the jurisdiction, was not tried till 10th October, 1883. He also deposed that at the trial of the election petition an application was made for a summons against the defendant under 39 Vict. c. 9, to have the penalties for bribery imposed upon him; and that the application was not disposed of till the 23rd November, at which date the Judge declined to interfere.

*Held*, that such delay as would not expose an ordinary suit to dismissal may be fatal to an action under this Act, under the special provision that such an action shall be carried on without wilful delay.

*Held*, also, there had been wilful delay not to be excused by the explanations given, and that the plaintiff was entitled as of right to have the action perpetually stayed or dismissed.

The order was made, dismissing the action without costs, for the reason that a *prima facie* case of bribery was established against the defendant, which he had not attempted to contradict.

[February 4, 1884.—*Boyd, C.*]

AN action to recover \$3,400 as a penalty for seventeen alleged breaches of the Dominion Controverted Elections Act, 37 Vict. ch. 9, at the election of a member to the House of Commons for the Electoral District of the County of Lennox, in June, 1882.

An appeal from the order of the Master in Chambers refusing an application to dismiss the action for wilful delay in prosecution under sec. 119 of the Act.

The facts appear in the judgment.

*Clement*, for the defendant (appellant).

*Bethune, Q. C.*, and *Aylesworth*, for the plaintiff (respondent).

BOYD, C.—Looking at the dates alone, there has been delay.

The acts of bribery complained of were committed between the 13th and 23rd of June, 1882. The writ was issued on the 12th of June, 1883, and was served on the defendant on the 27th November thereafter. The defendant, on the 30th November, moved to dismiss the action for wilful delay in prosecution, under the provisions of Dominion Act, 37 Vict., ch. 9, sec. 119, and failing before the Master, this appeal is brought. Has there been wilful delay? This term has been interpreted in actions for penalties under the election law. Martin, B., in *Taylor v. Vergette*, 7 H. & N. 143, thus defines it: "The term wilful delay does not mean perverse delay, but delay which the plaintiff cannot account for to the satisfaction of the Court in which the action is commenced. If the Court see that the action might have been commenced and prosecuted more speedily, and no sufficient reason is assigned for the delay, the plaintiff is undoubtedly guilty of wilful delay," p. 147. And again, in *Guest v. Caldicott*, 45 L. T. N. S. 610, Field, J., adopts the language of an earlier case thus: "The principle of wilful delay in this statute as laid down by Kenyon, C. J., in *Petrie v. White*, 3 T. R. 5, is the not doing a thing within a reasonable time to do it in." The later decisions do not follow the suggestion of Buller, J., in *Petrie v. White*, that wilful delay in this kind of action necessarily depends on the practice of the Court in which it is commenced. That dictum was cited, but disregarded in *Taylor v. Vergette*, 7 H. & N. 143, when Pollock, C. B., says: "It is no more an answer to say that the plaintiff has not exceeded the time allowed by law for declaring, than to say there has not been so much delay as in *Petrie v. White*." And Martin, B., says: "The plaintiff's excuse for his delay is, that he has taken the time allowed by the practice of the Court, and that he has been unable to get the evidence requisite to try with success. That may be very true, but it affords no excuse for this delay." And he then proceeds: "A person should not bring an action of this kind on speculation, but he ought, before he commences proceedings, to ascertain whether he has evidence to support it; and when he has



commenced proceedings he should be prompt and regular in continuing them, so as not to keep the action hanging over the head of the defendant an unnecessary length of time."

The reason of this is, no doubt, that which is pointed out in *Guest v. Caldicott*, 45 L. T. N. S. 610. The power given to private persons to prosecute for offences connected with elections is only to be exercised as an execution of a public trust to secure punishment of the particular offence, and therefore the Legislature means and prescribes that the prosecution must not only be within twelve months; but further, that the matter must not be kept hanging over the head of the defendant. The rules of time applicable to ordinary litigation are therefore not the measure of the diligence to be observed in pursuing remedies of this extraordinary statutable kind.

But even the Judicature Act, while giving a year for the service of the writ, contemplates, as a normal state of proceeding, that there shall be "prompt personal service:" RR. 31 and 34. It may well be said that if the ordinary time limits were to apply to this kind of action, there would be no meaning in the special language of the election law, that the action should be carried on "without wilful delay." It comes then to this, that delay which would not expose an ordinary suit to dismissal may be fatal to cases like the present.

The *onus* rests on the plaintiff to account for and satisfactorily explain his delay. The explanation of the delay, down to 10th October, is contained in the affidavit of his solicitor, sworn 3rd December. It appears that the plaintiff's solicitor was also solicitor for the petitioners in the Lennox election petition, at which election the acts of bribery complained of are alleged to have been committed, and in order not to endanger the success of that petition, it was deemed advisable not to serve this writ till that petition was disposed of, which, on account of objections to the jurisdiction, was not tried till 10th October. By a second affidavit, sworn 11th December, the further delay is thus explained, that at the trial of the election petition an application was made for a summons against the defend-

ant, under the 17th section of the Election Act, to have the penalties for bribery imposed upon him, and that this application was not disposed off till the 23rd November, at which date the Judge declined to interfere.

It is said that if the writ had been issued the names of the persons bribed would have been disclosed, and they would have been tampered with, and that such was not an ungrounded apprehension is manifest, because the persons bribed, who were examined at the election trial, testified that they had been approached by the defendant as to their evidence, as soon as the names were given in the particulars furnished in that case. It is answered by the defendant that these particulars were given on the 27th September, and that all motives for secrecy were then at an end, and that there has been a delay of two months from that time.

If the pendency of the election petition is to be regarded as a sufficient reason for the delay in proceeding with the action, then, in fairness to the defendant, the matter must be dealt with as if the petitioner therein and the plaintiff were the same persons. Then it appears that the petition was presented thirty days after the return complained of, and about the middle of August, 1882, when, it is not unreasonable to assume, the corrupt acts in question were known. But a delay occurs in suing out the writ till the last day of the year given by the statute for that purpose. No explanation is given of this tardiness which both Judges, in *Taylor v. Vergette*, 7 H. & N. 143, admit was material in weighing all the circumstances of the case.

Then, supposing secrecy to be an excuse, that is at an end on 27th September; and yet service is not made for two months afterwards. Nay, those presenting the election petition preferred to urge the imposition of penalties on the defendant under the 117th section, notwithstanding the fact that an action had been commenced against one of those proceeded against under that section. If that application had been successful, it would have involved a renunciation of the advantage of this action. But failing

in that, the plaintiff falls back upon this writ hitherto held in reserve, and proposes to place the defendant a second time in jeopardy for the same unlawful acts. This line of action, or inaction, is totally opposed to the sense and spirit of all the decided cases. And I think those cases are also opposed to the sufficiency of the circumstances alleged in excuse of the delay. Whether an election petition is pending or not, is not a matter to be regarded in weighing the rights of parties under the 119th section. The person who, as plaintiff, undertakes to vindicate the rights of the public and uphold the purity of elections, should proceed with singleness of aim, as if no other action were pending. The objections raised as to jurisdiction, which delayed the election petition, should have been rather a reason for his greater expedition in following and punishing the flagrant corruption of which he complains.

My conclusion is, that there has been wilful delay, not to be excused by any explanation offered on the part of the plaintiff, and that the defendant is entitled, as of right under the Act, to have the action perpetually stayed, or to have it dismissed. But I think this should be without costs, for the reason that evidence is put in establishing a *prima facie* case of bribery on the part of the defendant, which he has not contradicted. He makes no affidavit as to having any defence on the merits, and while he is entitled to stand upon the terms of the statute which gives this right of action, and imposes thereon the limitations which the plaintiffs have failed to observe, yet, the costs are in my discretion by virtue of the Judicature Act, and costs should not be awarded to a defendant against whom such charges are made under oath, and who does not think fit to exculpate himself by pledging his own oath to the contrary.

After I had written the foregoing reasons for my judgment, counsel appeared before me and stated that the application to the election Judge was not under section 117 of the Dominion Controverted Elections Act of 1874, but under the provisions of 39 Vic., ch. 9. That, of course,

will modify to some extent the language I have used in argument, as the punishment and penalty under this last Act do not appear to interfere with the right of action given to individuals by the former Act. But in substance this correction does not detract from the line of argument which led me to relieve the defendant from the further prosecution of this action.

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## SMALL V. LYON.

*Costs—Tender—Payment into Court.*

The defendant brought into Court with his defence a sum which he pleaded was sufficient to answer the plaintiff's claim, and the Judge at the trial finding that it was sufficient, directed judgment to be entered for the defendant, with costs.

*Held*, that the Judge at the trial had a discretion to deal with the question of costs, and having exercised it, the taxing officer had no alternative but to tax to the defendant his full costs incurred, as well before as after the payment into Court.

[February 14, 1884.—*Cameron, J.*]

AN action by a builder to recover the value of work done under a building contract.

The defendant brought into Court with his defence a sum which he pleaded was sufficient to answer the plaintiff's claim, and at the trial it was so found.

The Judge at the trial directed judgment to be entered for the defendant, with costs.

In taxing the costs the taxing officer taxed to the defendant his costs up to, as well as after defence, and refused to tax to the plaintiff his costs up to defence.

An appeal from this ruling of the taxing officer came on to be heard before Cameron, J., on the 11th February, 1884

*Shepley*, for the appeal.

*Aylesworth*, contra.

CAMERON, J.—On the facts shewn in this appeal from the taxing officer it is quite clear the appeal must be dismissed. The Judge at the trial having directed judgment to be entered for the defendant, with costs, the taxing officer had no alternative but to tax the defendant his full costs incurred as well before as after the payment into Court. I am equally without authority to interfere. The Judge at the trial has a discretion to deal with the question of costs, and must exercise such discretion in reference to the particular circumstances of each case. No doubt where a suit is forced upon a plaintiff to recover anything, and the defendant then pays into Court sufficient in the opinion of the jury or Judge before whom the case is tried to satisfy the plaintiff's demand, the plaintiff may well be entitled to costs incurred by the necessity of bringing his suit before the payment was made, but where the defendant has all along been willing to pay the amount, ultimately found to be sufficient, he ought not as a matter of justice to suffer any costs simply because the plaintiff, in order to determine the soundness of his contention, brings the action.

Before the Judicature Act, if the defendant before action tendered the amount he admitted to be due, and after action paid it into Court, and succeeded upon his plea setting up the sufficiency of such tender and payment, he got his costs as a matter of course. In many cases a tender is a mere idle ceremony, as the plaintiff's conduct may clearly indicate he will not accept the amount if tendered. In such a case I think the defendant who succeeds is as much entitled to his costs as he would be if he made a formal tender, and the Judge trying the case would exercise a sound discretion in making the plaintiff pay all the costs.

As far as this case is disclosed on the statement of claim and defence, and in the argument on the appeal, this is such a case, and the defendant ought not, as a matter of justice as between him and the plaintiff, be subjected to any costs. I say as between him and the plaintiff, because



he may have thought himself aggrieved, and may possibly have been very strictly and illiberally dealt with by the architect, but if so the defendant was not to be injuriously affected in consequence. He had a perfect right to rely upon the judgment of the architect, and it is fair to assume the architect in giving his certificate would only be influenced by proper considerations.

The case of *Langridge v. Campbell*, 2 Ex. D. 281, is entirely in favour of the defendant, while *Buckton v. Higgs*, 4 Ex. D. 174 supports the view I have above expressed, that the costs in such a case are in the discretion of the Court, and the discretion ought to be exercised where the plaintiff has been forced to bring his action to get what is paid into Court, that is what is admitted to be due to him, to give the plaintiff the costs as far as it was necessary for him to go to recover what was so justly due to him. If the old law prevailed as it existed under the Common Law Procedure Act, I should say the latter part of clause 102 of that Act is in favour of the defendant's right to get his full costs. The Legislature may well have thought it would only be a just penalty to impose upon a plaintiff pursuing an unjust claim, the obligation of paying the whole of defendant's costs, instead of confining such costs to the period when the unjust pursuit commenced.

The appeal is dismissed, with costs.

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## LEECH v. WILLIAMSON.

*Interpleader issue—Attaching creditors.*

The Master in Chambers made an order directing an interpleader issue to be tried between the plaintiff and certain attaching creditors as to the validity of the plaintiff's judgment and execution.

*Held*, that the issue directed was warranted by sec. 10 of R. S. O. ch. 54 (the Interpleader Act.)

The order provided for the trial of the question of the validity of the plaintiff's judgment as against creditors generally, and also provided that on the trial of the issue it should be open to the attaching creditors to shew that the plaintiff's judgment was void as against the attaching creditors for fraud, or as being a preference.

*Held*, that these provisions were warranted by sec. 3 R. S. O. ch. 54.

[February 22, 1884.—*Rose, J.*]

AN appeal from the order of the Master in Chambers, directing an interpleader issue.

*Holman*, for the first execution creditor.

*Aylesworth*, for the sheriff and certain attaching creditors.

*Shepley*, for other attaching creditors.

The facts appear in the judgment.

ROSE, J.—The issue is directed to try the question whether the judgment and execution obtained by the plaintiff Leech, "ought to be deemed and taken to be void as against William McMaster & Co., and MacKay Bros., (attaching creditors,) as such attaching creditors, or as representing themselves and the above mentioned other creditors of the said Williamson, or as against the creditors of the said Williamson personally." The order further provided "that on the trial of the said issue, it shall be open to the plaintiff therein to shew that as against them the said judgment recovered by the said Leech is void for fraud, or as being a preference which renders the same void as against the writs of attachment of the said plaintiffs, McMaster & Co., and MacKay Bros."

Mr. Holman urged that the Interpleader Act did not provide for the case of a claim by an attaching creditor, and

that the sheriff could not interplead upon a claim under a writ of attachment against absconding debtors.

2. That an attaching creditor could not attack by way of interpleader proceedings, a prior execution creditor, but must rely on the provisions of the Absconding Debtors Act.

3. That the issue should not have embraced both attaching and execution creditors.

4. Nor should it have provided for the question as to validity of the judgment as against creditors generally.

5. Nor contain the provision as permitting the said McMaster & Co., and MacKay Bros., to shew that as against them the judgment recovered by the said Leech is void for fraud, &c.

The first three objections may be considered together. The Interpleader Act provides sec. 10, ch. 54, R. S. O. "In case any claim is made to any goods or chattels, or to any interest in any goods or chattels, taken \* \* in execution \* \* or to the proceeds or value thereof \* \* by any person not being the person against whom such \* \* execution issued \* \* or by any second or subsequent judgment or execution creditor claiming priority over any previous judgment or execution, \* \* " then upon application of the sheriff an order may issue.

In this case there were in the sheriff's hands when the executions and attachments reached him, "goods or chattels" or "proceeds" "thereof." A claim was made by the attaching creditor. The language, "by any person," is surely wide enough to cover such a claim.

The Absconding Debtors Act, ch. 68, R. S. O., sec. 21, does not apply. It only provides for pending actions, *i.e.* actions in which the writ of summons was served before and execution obtained after the writ of attachment reached the hands of the sheriff, but before execution is obtained by the plaintiff in the writ of attachment. I think the first three grounds fail.

The 4th and 5th grounds are in my opinion, met by provisions of sec. 3 of the Interpleader Act, ch. 54, R. S. O.

The form of the order has been carefully settled by the learned Master. His experience and learning are well known. Counsel familiar with the decisions as to practice, are unable to refer me to any authority either expressly or impliedly in their favour, and I decline to vary the order. Further time to deliver the issue was asked. I understood Counsel to agree among themselves as to this. I think no case was made as to change of venue.

Appeal dismissed with costs in any event of the cause, to be added to the costs of the motion below.

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WALTON V. WIDEMAN ET AL.

*Trial—Changing place of.*

The plaintiff lived and carried on business in Toronto, the defendants in Parkhill, near London. The action was brought upon a contract to purchase certain goods obtained by an agent of the plaintiff, who solicited the order in Parkhill where the contract was signed. The goods were to be delivered by the plaintiff to the Grand Trunk Railway Company in Toronto. The defence set up fraud in obtaining the contract. The plaintiff proposed to have the action tried at Toronto. The defendants swore that they intended to call six witnesses: that the cause of action arose in Parkhill: and that the expense of a trial at Toronto would be greater by \$30 than at London. The plaintiff swore that he intended to call six witnesses and give evidence himself: that four of the six lived in Toronto, one east of Toronto and one in Parkhill: and that the extra expense of a trial at London would be about \$25.

*Held*, that the cause of action arose in Toronto, and that there was no such preponderance of convenience in favour of London as would justify a change of the place of trial following *Noad v. Noad*, 6 P. R. 48; *Davis v. Murray*, 9 P. R. 222, and *Robertson v. Daganeau*, 19 C. L. J. 19. Appeal allowed, and place of trial restored to Toronto.

[February 24, 1884.—*Rose*, J.]

AN appeal from the order of the Master in Chambers, changing the place of trial from Toronto to London.

*F. E. Galbraith*, for the appeal.

*Aylesworth*, contra.

The facts and cases cited appear in the judgment.

ROSE, J.—The facts are as follows: Plaintiff resides in Toronto where he carries on his business, defendants reside in Parkhill, near London, where they carry on business. The contract in question was obtained by an agent of plaintiff's, who solicited the order in Parkhill, where the contract was signed. Fraud is alleged in obtaining the contract. The contract requests plaintiff to deliver the goods to the Grand Trunk Railway Company in Toronto. The delivery to defendants would therefore be complete when the Grand Trunk Railway received them. The defendants obtained this order to change place of trial on an affidavit shewing that they intended to call five witnesses besides Christian Wideman, one of the defendants—in all six—that the cause of action arose in Parkhill (evidently a mistake) and that the extra expense would be about \$30. To this the plaintiff answered showing that he intended calling six witnesses besides himself—in all seven—four of whom reside in Toronto, one east of Toronto, and one in Parkhill, said to be one of the witnesses to be called by the defendants. Also showing that it might be necessary to call more witnesses who reside in or near Toronto, if the defendants adopt a special line of defence—not very clearly defined. The plaintiff states the extra expense of going to London for trial to be about \$25, and calls attention to the great convenience of having the trial in Toronto, as he and all local witnesses could be summoned at a moment's notice by telephone. The learned Master thought the venue and place of trial should be changed and so made an order. I am asked to review his judgment, and set aside the order. I have referred to the following cases: *Levy v. Rice*, L. R. 5 C. P. 119; *Harper v. Smith*, 6 P. R. 9; *Noad v. Noad*, 6 P. R. 49; *Gilmour v. Strickland*, 6 P. R. 254; *Gwatkin v. Evans*, reported in a note to *Gilmour v. Strickland*; *Davis v. Murray*, 9 P. R. 222. *In re Robertson and Daganeau*, 3 C. L. T. 266; *Diamond v. Gray*, 5 P. R. 33.

In *Diamond v. Gray* Gwynne, J., says: "Where the ground of the application is the expense attending the



trial in the county where the venue is laid, the preponderance of convenience must be very great." He cites the judgment of Tindal, J., in *Thornhill v. Oastler*, 7 Scott 272, as follows: "The plaintiff's right in a transitory action to lay the venue where he pleases is undoubted and before we deprive him of it we must be clearly satisfied that justice cannot be done between the parties unless we do so."

In *Harper v. Smith*, Mr. Dalton, Master in Chambers, following *Levy v. Rice*, lays stress on the fact as to where the cause of action arose, and quotes the remarks of Bovill, C. J., and Montague Smith, J., to the effect that when the preponderance of convenience, place of contract, and defendants residence concur, these should regulate the Judge's decision in ordering a change of venue. In *Gilmour v. Strickland* the same learned Master refused to change the venue, and on appeal Hagarty, C. J., dismissed the appeal, following *Church v. Barnett*, 40 L. J. N. S. 138, where Willes, J., said: "The plaintiff has a right generally to lay his venue where he thinks proper, and when he has not exercised a capricious choice it is to be considered that he has exercised a right, and it lies on the defendant to shew that the preponderance of convenience is in favour of trying the case where the cause of action arose, rather than at the place where the plaintiff has laid the venue." It will be noticed that in *Church v. Barnett* the venue was laid at a place other than where the cause of action arose. In *Gwatkin v. Evans* the learned Master, Mr. Dalton, said: "It appears that the number of witnesses to be called by either side is about equal. Prior to the C. L. P. Act, the place where the cause of the action arose was a very material matter in deciding upon a change of venue, but that Act specially extended the facilities of suitors by its provisions with respect to transitory actions. So that now, although the place where the cause of action arose is a circumstance in these applications, it is merely a circumstance, and if allowed to have much weight would have the effect of making many actions local which the Act intended to be transitory." If these

remarks were warranted by the change under the C. L. P. Act, the provisions of the Judicature Act extend the "facilities" even much farther than before.

In *Noad v. Noad*, 6 P. R. 9, Blake, V.C., in his judgment on an appeal from a decision of Mr. Holmsted refusing to change the venue, was of opinion that "a very large preponderance of convenience" had to be shewn to entitle defendant to a change of venue. He adds, "It is quite impossible as a general rule to enter into the investigation whether one class of witnesses will be more injured than another by absence from home."

In *Davis v. Murray*, 9 P. R. 222, Cameron, J., cites with approval the principles of decision in *Noad v. Noad*, and although the defendant had far more witnesses than the plaintiff, he did not think that that justified a change of venue on the preponderance of convenience. He deduces from the decided cases two grounds upon which a decision to change the venue must rest, especially since the Judicature Act, they are: "A preponderance of convenience embracing the consideration of expense, not a bare, but substantial preponderance; and that a fair or impartial trial cannot be had in the place selected."

This decision was followed by Proudfoot, V. C., in *Robertson v. Dagueau*, 3 C. L. T. 266: where the defendant, his solicitor, and all his witnesses (four at least) lived either in or west of Chatham. The plaintiff lived in Scotland, his solicitors in Toronto, his witnesses in or west of Chatham—numbers not disclosed. The difference in expense was named at from \$20 to \$40. The plaintiff named Toronto as the place of trial, Mr. Winchester, official referee, changed the place of trial to Chatham, the learned Vice-Chancellor reversed this decision following *Davis v. Murray*, holding that a very great preponderance of convenience or expense must be shewn in order to deprive the plaintiff of his *right* to name the place of trial where he might see fit, and that such a preponderance was not shewn.

The cases of *Noad v. Noad*, *Davis v. Murray*, and

*Robertson v. Daganeau* form a chain of decisions which afford authority much stronger than necessary to lead to the conclusion that the venue should not have been changed in this case. If force and effect are to be given to the words "preponderance," "great preponderance," "very great preponderance of convenience," "right of plaintiff," &c., something more must be shewn than a majority of one or two witnesses, and an extra expense of \$30. The cause of action did not arise in Middlesex, the great preponderance of convenience is not shewn in favour of trial in that county; it is not suggested that a fair trial cannot be had in Toronto, the plaintiff resides and carries on business there; at least four of his witnesses reside there; he has a *right* to name Toronto as the place of the trial. If the trial takes place there, neither he nor any of his four witnesses will be obliged to leave their home, and will probably only be compelled to be away from their places of business for a few hours, as by telephonic communications they can be promptly summoned to the Court House. The goods were delivered to the defendants in Toronto, and to counter balance this, the defendant swears to a possible majority of one or two witnesses and a possible extra expense of \$25. It will also be borne in mind that the defendants and their witnesses must leave home in any event, and that travelling to Toronto will only occupy some two or three hours more than to London. It seems to me it will not be very difficult to follow the principles laid down in the cases I have endeavoured to digest and thus settle the practice on a basis in accordance with the spirit of the Judicature Act, enlarging the beneficial provisions of the C. L. P. Act pointed out by the learned Master in *Gwatkin v. Evans*, note in 6 P. R. 254.

I was referred to *Phippen v. McLeod*, 7 P. R. 377, a judgment of Armour, J., as laying down principles opposed to those above set out. A reference to the facts of that case and the decision makes it apparent that it cannot possibly be thus read. I am glad this is so, for with the admiration that I have for the opinion of that very

learned Judge I should have much hesitated had I found myself coming to a conclusion different from that at which he had previously arrived.

Mr. Aylesworth pressed upon me that as the plaintiff's agent had sought out the defendants at their place of business, it was only fair that the litigation should be conducted there. To this may be answered that when parties purchase from a Toronto, or it may be a Hamilton or London firm, they must expect them to endeavour to have any litigation conducted in the town where they carry on their business, owing to the great interruption of business consequent upon the production of books, absence of book-keepers, and other disarrangement of business if the trial be conducted at a distance. In most cases it is perfectly well known that the preponderance of convenience is very largely in favour of having the trial conducted at the town where the wholesale dealer resides.

With great deference to the learned Master I am unable to concur in his judgment, and therefore allow the appeal. I think the costs should be costs in the cause to the plaintiff.

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### WANSLEY V. SMALLWOOD.

*Divisional Court—Appeal—Further directions—Rules 317-510 O. J. A.*

The action was not tried, but was referred to the Master, further directions and costs being reserved. After report made the case was heard on further directions before Proudfoot, J.

*Held*, that the case could not be reheard before the Divisional Court, as the proceedings taken could not be regarded as the trial of an action within the meaning of Rules 317 and 510 O. J. A.

When a case is improperly set down to be reheard, a substantive motion should be made to strike it out.

[February 26, 1884. --- *The Divisional Court, Chancery Division.*]

AN appeal from the judgment of Proudfoot, J., pronounced in Court upon further directions was set down upon the



list of cases for hearing before the Divisional Court, Chy. Div.

*Richards, Q.C.*, for the appeal argued that a hearing on further directions was in effect a continuation of the trial and a judgment pronounced upon the trial could be appealed from to the Divisional Court under Rule 501.

*Walter Read*, contra, objected that the Court had no jurisdiction to entertain it.

BOYD, C.—The Judicature Act and Rules make a plain and express distinction between the various modes of trial, and the trial before a referee is dealt with as a different thing from that before a Judge (see secs. 46 and 47, O. J. A. and rules 277, 316, and 317.) In this case the action was by consent of the parties not tried in the usual way, but the whole was referred to the Master, reserving further directions and costs. After the Master's report was absolute it again came up in Court upon further directions before Proudfoot, J., who pronounced the judgment now in appeal.

This is not in my opinion to be regarded as the trial of an action before that Judge under R. 317 or the substituted later Rule 510. If such a construction debarred either party from the right of appeal, perhaps such an extreme latitude of construction as was contended for by Mr. Richards might be admissible, but there is always the right to go to the Court of Appeal under sec. 37 of the Act, and that I think (having regard to the line of decisions upon this question) is the only appellate forum open to the defendant; *Re Galerno*, 46 U. C. R. 379; *Trude v. Phoenix*, 29 Gr. 426; *McTiernan v. Fraser*, 9 P. R. 247.

In my opinion the Divisional Court has no jurisdiction to review the judgment of Proudfoot, J. The plaintiff should have moved, as in *McTiernan v. Fraser* and in *Trude v. Phoenix*, to strike the action out of the list as imperfectly set down. For this reason I am disposed to strike out the case now, but without costs.

PROUDFOOT and FERGUSON, JJ., concurred.



## FRITH V. RYAN.

*Affidavit on production—Examination of parties—Chy. G. O. 268—Rules 226 and 283, O. J. A.*

Chy. G. O. 268 has been superseded by Rule 283, O. J. A.

A party to an action cannot now be examined upon his affidavit on production, with this exception, that by Rule 226, O. J. A., an officer of a corporation may be so examined.

[M arch 12, 1884.—*The Master in Chambers.*]

A motion made *ex parte* by the plaintiff for an order to examine the defendant upon his affidavit on production filed in the action.

*A. J. Williams*, for the motion.

THE MASTER IN CHAMBERS,—I understand G. O. Chy. 268, to be superseded by Rule 283 of the Judicature Act. And under that last rule, to authorize examination there must be a motion, petition, or summons, or other proceeding pending or contemplated, and an affidavit made to be used, or which shall be used on such motion, &c.

There is an exception by Rule 226, Judicature Act, in the case of an affidavit on production by the officer of a corporation. In that case the deponent is subject to examination on his affidavit by express enactment.

I am sorry there should be that exception. We are not under the infliction of three practices running parallel, I trust. Rule 283, of the Judicature Act, is what must be looked to for the general law.

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## IN RE STUEBING, ANTHES V. DEWAR.

*Administration—Solicitor's commission under G. O. Chy. 643.*

In an administration suit in which the estate was insolvent, the total assets being \$72,000, the liabilities \$133,475, and the creditors 180 in number, and in which the commission of the solicitor who acted for all parties was allowed by the Master, under G. O. Chy. 643, at \$995, eight creditors, at the close of the suit, and without notice to the solicitor until fourteen days before moving, applied for an order for the delivery and taxation of the solicitor's bill instead of the allowance of the commission, on the ground that the commission was excessive.

*Held*, that the commission was not so exorbitant as to warrant the substitution of a taxed bill, and a probable reduction by that mode of payment, especially as the benefit to the creditors would be trifling.

The scope of the G. O. Chy. 643, is merely to aid in fixing a solicitor's remuneration. It is not intended to do strict justice, but is only a sort of convenient expedient for fixing costs without taxation.

A very liberal compensation in such cases is not *per se* a reason for reducing the commission, or directing the taxation of a bill in its stead nor *per contra* is a low or inadequate compensation a reason for increasing the commission, or directing payment by a taxed bill.

*Seemle*, that, in cases affected by this order, any party interested in the estate, who may desire that a solicitor should be paid in the particular matter or suit on the scale of a taxed bill instead of by commission, should give notice to the solicitor to that effect, and have the Master note it in his book, at the earliest stage possible in the proceedings, but there is no practice authorizing the substitution of a bill of costs for commission at the option of any party.

[March 3, 1884.—*Boyd*, C.]

THIS was a suit for the administration of the estate, real and personal, of Conrad Stuebing, late of the town of Berlin, in the county of Waterloo, wholesale merchant, deceased. Previous to his death on the 14th of May, 1883, the deceased had made a will, but he died insolvent, leaving a valuable estate and large liabilities to persons residing in Canada, the United States, Great Britain, and Germany. On the 20th of June, 1883, the defendant David Burton Dewar, manager of the Canadian Bank of Commerce at Berlin, was appointed by the Surrogate Court administrator with the will annexed, and, on the 26th of the same month, the plaintiff John Schmidt Anthes, a local creditor, obtained an administration order in the usual form. The reference was to the Master at Berlin, and the suit, which was a friendly one, proceeded in the regular way till the settlement of the final report in the Master's office when an

objection was raised by a firm of local solicitors, acting for some of the creditors, to the commission (\$995) allowed by the Master to Mr. John King, solicitor for the plaintiff and administrator. The objection was followed up by the present application which was alleged to be made on behalf of the defendant, and William Oelschlager and other creditors of the deceased, for an order that, instead of a commission on the amount realized out of the estate being allowed to the solicitor under the G. O. Chy. 643, it be referred to the Master to tax and settle the bill of fees charges and disbursements of the solicitor, on the ground that a commission on the amount realized would be excessive.

*C. Bitzer* (Berlin) for the motion.

*Hoyles* and *J. King*, (Berlin,) contra, were not called upon.

BOYD, C.—I do not think I should interfere in this matter having regard to the principles which, in my opinion, should prevail in applications of the kind, as well as to the evidence which has been produced here, and, therefore, I have not called upon counsel to reply to the argument in support of the motion. The insolvency of the estate is no doubt a material circumstance, but, taken in connection with the other salient features of the case it is not entitled to the consideration which otherwise it might deserve. There are, it seems, about one hundred and eighty creditors interested in the estate, whose claims, as passed and allowed by the local Master, amount to the large sum of \$138,475. Of these but eight, at the most, have joined in the application, while it is not free from doubt that even these eight are unanimous. Mr. Fox, who has been named as one of the parties, did not himself sign the retainer of the solicitors for the applicants. His name was signed by his son, and he himself apparently knew nothing about the application until it was set in motion. Mr. Boehmer, another of the number, seems to have signed it under a misapprehension, and to be not unwilling that

the full amount of the commission should be allowed. A third speaks in his deposition of not wishing to be a party if he were to run the risk of paying costs. All but one of them, who were examined, say that they were not informed that the solicitor was to be paid a commission instead of fees for his services in the ordinary way. They appear to have acted, at the outset at least, with a misunderstanding of the usual practice in such cases, while the administrator, on his part, disclaims the application as being made on his behalf. We are not told of the aggregate sum represented by these eight creditors. The largest individual claim, as far as we can discover, is \$1,900, while the sum total of the eight claims must be, to say the least, a small proportion of the large sum proved by all the creditors against the estate. Then again it must be remembered that this is a creditor's suit, brought for the benefit of all the creditors, who, if they are not actually parties, are at least of a class represented by the plaintiff for whom the solicitor, Mr. King, has been acting. The plaintiff has not joined in the motion, and although he does not expressly repudiate it, it cannot be assumed to be favoured by him and the general body of creditors whom he represents.

The commission allowed, \$995, is a liberal sum; perhaps I am not using too strong language if I say it is extremely liberal. At the same time it is evident that, in the winding up of such an estate, there must have been a good deal of professional work and service of one kind or another, while the varied responsibilities of the solicitor must also be taken into account. He was, as he says, the only solicitor known to most of the creditors. He acted for the plaintiff and for the administrator, and, although it may be to a certain extent doubtful whether he also acted for the widow, she at any rate consulted him occasionally, and there were interviews between them in the course of which her interests formed a subject of discussion. It is difficult to say how a bill for all these different services would compare with the commission which, under the order, is given in lieu thereof. It is probable that the items would be very

considerably cut down. But, be this as it may, I am not prepared to say that the amount although large is, under all the circumstances, exorbitant, or at least so exorbitant that it should be cut down. Putting it upon the footing alone of the number of claims which came in and were adjudicated upon, it will not appear anything like as extravagant as it might at the first blush. There are, it is said, one hundred and eighty claims, most of which apparently were sent in to the solicitor, and allowing a fee of say four dollars on the adjudication of each of these, which would be a very small compensation, there would be a sum of \$720 as the reward for the services rendered under that head alone. It may be that Mr. King did not specially appear in the Master's office for all the creditors, but notwithstanding this, and judging of his services in that respect on the basis which I have indicated, with a view to an approximation of their value as a whole, it is manifest that he would still be entitled to a considerable sum. To this would have to be added the fees which the tariff would give him in respect of his other services to the plaintiff, administrator, &c. His illness was not, as far as I can see, prejudicial to the estate, while he was obliged thereby to pay for other assistance in attending to it.

I am also at a loss to discover what material benefit would be derived by the particular creditors who are seeking an order for the delivery of a bill, or by the creditors generally if such an order were made. The number of claimants is unusually large, and, however much or little the amount of the commission might be reduced by adopting the other mode of payment, the reduction, when distributed over the whole one hundred and eighty claims, would be very trifling in the case of each claimant. In fact the profit to all of them would be a mere bagatelle.

One fact, which is very material to be considered in disposing of the matter, is one that has time and again been presented here in determining questions of a similar kind. It is the statement in the solicitor's affidavit that, from the first, he was fully under the belief that he would be paid a



commission for his services, and not on the scale provided by the tariff in the case of a taxed bill: that he had no notice to the contrary until some fourteen days before the application was made, and that consequently he did not keep that full and complete record of his fees which otherwise he would have done. In fact he says that he has scarcely any such record, and that he could not now supply it with anything like justice to himself. There is nothing surprising in this. It is a thing of not unfrequent occurrence among solicitors since the order referred to has been in force, that many of them are not in the habit of preserving a minute record of proceedings under that order, as in other cases.

There is much to be said against the unfairness of compelling the delivery and taxation of a bill under such circumstances. A solicitor has for months been performing work and service of various kinds in the course of the partition, or administration of an estate. No intimation has been given him that he will have to furnish an itemized bill; he has worked on in the belief that none such will be required, and that all he has to do is to secure all he can out of the estate for those interested, make it as productive as possible and reap his reward on the total sum realized. At the eleventh hour, when the proceedings are all but closed, a demand is made upon him for a bill of his fees in detail with a view to taxation. It would, I think, be rather hard on solicitors if those for whom professional services were thus being rendered from day to day, for a considerable period of time, without notice or warning of any kind that an account would be demanded, were to be allowed to come in at the end of the hunt and say: "We are going to pay you by taxable items, and in no other way." I think it only reasonable and just, in all cases affected by this general order 643, that notice should be given to solicitors at the earliest stage possible: that it is the intention of some one or all of the parties interested therein to urge at the proper time that it is a fit case for remuneration by way of taxed costs, instead of by commission, and at the same time

have the Master make a note of the matters in his book. Solicitors would then know what was expected of them, and prepare themselves accordingly.

It has been remarked here that there is nothing novel in the present application, and that effect has been given before to the order by directing the taxation of solicitors' bills, instead of the allowance of a commission. I think this is a mistake. In the three years I have been upon the Bench no such application has been made to me. I have heard of none being made to my brother Judges, and I believe I am correct in saying that this is the first one of the kind that has been made. The scope of the order referred to is, as I interpret it, merely to aid in fixing the remuneration to be given in the cases to which it applies. It is not intended to do strict justice in every or any case, but is only a sort of rough and ready means of fixing costs without taxation. In some cases, perhaps not a few, solicitors suffer some injustice by its operation. The compensation allowed is, I have no doubt, often less than it would be on the taxation of an itemized bill, and not unfrequently less than it ought to be, if taxed according to the usual tariff. Here it happens to be liberal. But that is not *per se* a reason for reducing the commission, or directing the delivery and taxation of a bill in its stead, nor is a low or inadequate compensation any reason for increasing the commission, or directing payment by a taxed bill. In the common phrase, you have to take the fat with the lean. In the present instance it has been Mr. King's good fortune to fall upon a generous commission; yet, like some of his brethren, he may occasionally have worked for a very lean one. The sum is probably larger than might be awarded in the manner desired, but the difference would be so trifling a benefit to the claimants that I do not see any injustice in refusing it. I, therefore, dismiss the application, but without costs, unless it be agreed that the costs of all parties should be paid out of the estate, to which I have no objection.

*Motion dismissed*

## SHEPPARD V. KENNEDY.

*Lis pendens* — Vacating same—Endorsement on writ.

A *lis pendens* should not be vacated unless it appears from the endorsement on the writ or the pleadings that the claim upon the land is not an appropriate remedy. There should be clear and almost demonstrative proof that the writ is an abuse of the process of the Court.

*Jameson v. Lang*, 7 P. R. 404, approved of.

When a plaintiff seeks to register a *lis pendens* he should be more precise in respect to the endorsement on his writ than in ordinary cases, and should define generally the grounds of his claiming an interest in the lands.

[March 5, 1884. — *Boyd*, C.]

THIS was an application to vacate a *lis pendens* under the following circumstances.

On February 9th, 1884, the plaintiff issued a writ in the Chancery Division against M. Kennedy and T. S. Stewart, and endorsed it as follows: "The plaintiff's claim is to have a deed made between the defendant, M. Kennedy, and the defendant, T. J. Stewart, set aside and cancelled, of lots 4 and 5 in the 2nd range south of the Durham Road in the township of Kinloss, in the County of Bruce, and to restrain the defendants from disposing or encumbering the same."

The defendant, Kennedy, showed by affidavit that there had been no sale of the said lands from him to Stewart; that a deed had indeed been drawn up and signed by him, and handed to Stewart, but with the understanding that Stewart should satisfy himself as to the title, and as to incumbrances, and the sale should only be carried out if these enquiries proved satisfactory; that, on enquiry, Stewart found four writs of execution against the lands of Kennedy in the sheriff's hands, and thereupon sent back the deed, which had been cancelled, and refused to go on with the sale; that Kennedy had then taken steps to have these writs of execution set aside, and had succeeded in the case of three of them; that the fourth was the execution of the plaintiff in a County Court case against Stewart, and Kennedy had made a similar application to set this aside,

which was pending, the Judge having heard the application, but reserved judgment.

In answer, the plaintiff produced the affidavit on which Kennedy was moving to set aside his execution, in which Kennedy admitted the debt due on the promissory note, on which the plaintiff was suing in the County Court; and also showed that Kennedy had no other means wherewith to pay his claim, which would be endangered by vacating the *lis pendens*; and that the consideration in the deed from Kennedy to Stewart was \$2,400, whereas the land was worth \$3,000 or \$4,000; and that Kennedy was apparently trying to realise on his property, and would return with the proceeds to Dakota, where he had been residing for two or three years past.

The motion was made before Mr. DALTON, Master in Chambers, on Feb. 27th, 1884, who, on March 3rd, 1884, gave judgment as follows: "It is not useful for me to consider this case particularly, for *Jameson v. Laing*, 7 P. R. 404, must prevent me probably from granting what is asked. I, therefore, take the course suggested in that case of referring to a Judge, that the relief also there suggested may be given to the defendant if he be entitled."

On the same day the matter was again argued before Boyd, C.

*H. J. Scott*, Q.C., for the motion.—The plaintiff has no right to tie up the defendant's land in the manner he is attempting to do. It is an abuse of the practice of the practice of the Court. *Jameson v. Laing*, 7 P. R. 404 is of doubtful authority. If the plaintiff's execution proves good there is no need of the *lis pendens*, at all events the plaintiff should be sent to a speedy hearing.

*A. H. F. Lefroy*, contra.—*Jameson v. Laing* is an authority in our favour, but our case is a stronger one than that, for (1) we are at present, at all events, judgment creditors, with executions in the sheriff's hands; (2) the defendant, Kennedy, admits our debt, and, therefore, on



the principle that he who seeks equity should do equity, the *lis pendens* should not be vacated unless he pays into Court what he admits is owing. Moreover, admitting the debt as he does, this can scarcely be called an illusory and fictitious suit.

BOYD, C.—By the endorsement on his writ the plaintiff's claim is to "have a deed made between the defendant, Kennedy, and the defendant, Stewart, set aside and cancelled, of lots 4 and 4 (giving description), and to restrain the defendants from disposing or encumbering same." It is further stated by endorsement that the plaintiff sues on behalf of himself and of all other creditors of the defendant, Kennedy.

By virtue of this writ the plaintiff has registered a certificate of *lis pendens*, which the defendant now moves to vacate. There is no complaint of the insufficiency of the endorsement of claim, and it is not asked that the action should be dismissed, or the writ taken off the files as an abuse of the process of the Court. The motion is to vacate the registration of the *lis pendens*, on the ground that the action is illusory. Of this I am not so clearly satisfied that I will deprive the plaintiff of the chance of litigating as to the meaning of the transaction between the defendants. It may well be that nothing more happened than is detailed in their affidavits, but no suitor is obliged to submit to a preliminary trial of his case on affidavit. If the plaintiff chooses to go on to attack both defendants on the footing of there being a deed of the property from one to the other which was intended to defeat and defraud creditors, he should not have his right to a trial intercepted in a summary way. I cannot, upon the materials before me, conclude the plaintiff by saying that his action is fictitious and illusory. He may be beaten at the trial, but my very strong impression is that he has the right to prosecute the litigation to that point, if he is so advised.

The endorsement on the claim may be developed into a statement of claim, which will show a valid cause of action against both defendants. At present no cause of action is



clearly stated in the endorsement. It may be sufficient under R. 11, but my own view is, that where the plaintiff seeks to register a *lis pendens* he should be more precise than in ordinary cases, and by his endorsement he should define generally the grounds of his claiming an interest in the land. The right to register a *lis pendens* arises from the statute R. S. O. cap. 40, sec. 90, as it merely places on record the historical fact that litigation is pending, touching a particular property. While this litigation is pending, I see great difficulty in making any such order as is asked here to vacate the registration of the *lis pendens*, except in that class of cases where it appears from the endorsement or pleading that the claim upon the land is not an appropriate remedy. Thus, if a wife sued for alimony, and alleged that unless her husband was enjoined from selling his land he would dispose of it to her prejudice, and upon this statement registered a *lis pendens*, the Judge might and would declare that the certificate had improperly issued, and the registration of that order would operate to clear the register.

But here there may be a cause of action affecting the land and the motion is not to set aside the writ as a vexatious thing, but merely to vacate the registration. As at present advised, I cannot clearly say that the action is illusory and fictitious, even if a direct attack was made upon the writ, and that being so, I should not now interfere, *Jacobs v. Raven*, 30 L. T. N. S. 366. I had occasion to consider the cases in which such an action as the present could be sustained in *Campbell v. Campbell* 29 Gr. 252.

But this is a case in which the trial of the action should be expedited. The plaintiff should serve his statement of claim forthwith and go down to trial at the next sittings of the Court at Goderich.

I approve generally of the practice laid down in *Jameson v. Laing*, 7. P. R. 404, where the motion is to take the writ off the files as an abuse of the process of the Court. There should be a clear and almost demonstrative proof that it is so before the plaintiff's right to have his case tried is interfered with.

But where the motion is to vacate the registration of the *lis pendens* because the remedy against the land is not appropriate to the cause of action which is pending, then I see no reason why the Master may not finally dispose of the matter without referring it to a Judge. I reserve the costs of the present application to be dealt with subsequently.

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NORDHEIMER ET AL. v. MCKILLOP ET AL.

*Witness—Credibility—Commission.*

A commission will issue to examine a witness, notwithstanding that his character for veracity is impeached.

The proper course in such a case is to call witnesses at the trial for that purpose.

[March 10th, 1884,—Galt, J.]

THIS was an action of replevin. One G. was tenant of the defendants, he had purchased on the hire receipt principle from the plaintiffs a piano, which was put into his hotel at B. Before the plaintiffs would allow the piano to be put into the hotel, they required G to obtain from the landlord a waiver of all distress for rent as against said piano. This waiver was signed by G. himself under and in pursuance of a power of attorney. G. absconded to the States. Defendants distrained this piano for rent alleged to be due, and the plaintiffs replevied it upon the strength of said waiver.

The plaintiffs now applied for a commission to examine G., to prove that he signed the waiver under power of attorney, and also to prove that no rent was due at date of seizure.

The defendants resisted the application on the ground that G. was not a credible witness, that he could not be believed upon his oath, and that they desired him present in Court so that they could subject him to a rigid cross-examination, and shew his demeanour to the jury.

*McPhillips*, for the motion, contended that he had made out a proper case for a commission, that the credibility of G. could not be tried on affidavits in Chambers, but was a question for the jury at the trial.

*Clement*, for the defendants, relied upon.

*In re Boyle—Crofton v. Crofton*, 20 Chy. Div. 760, and the case there cited.

THE MASTER IN CHAMBERS made the order.

On appeal, argued by the same Counsel.

GALT, J., affirmed the order of the Master in Chambers, and dismissed appeal, with costs to the plaintiffs, holding that it was a proper case for a commission; if the defendants wished to attack the character for veracity of G., they could do so in the usual way by calling witnesses at the trial.

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## MCDOUGALL V. LINDSAY PAPER MILL COMPANY.

### *Local Master—Jurisdiction.*

The plaintiff, as mortgagee of the defendants by an instrument dated January 30th, 1883, purporting to be duly executed by the plaintiff, commenced an action for the sale of the mortgaged property. The writ issued duly indorsed under Rule 17 O. J. A. and default being made, judgment was obtained under Rule 78 O. J. A. referring it to the Master at Lindsay to make and take the inquiries and accounts as prescribed by G. O. Chy. 441 (form 168 O. J. A.)

The Master gave certain execution creditors who had been made parties in his office and proved their claims, priority over the plaintiff on the ground that the instrument in question was invalid, the terms of sec. 85 of the Canada Joint Stock Company's Act of 1877, which require the sanction of a two-thirds vote of the shareholders not having been complied with.

*Held*, that under the decree the Master had no power to adjudicate upon the validity of the instrument in question as a mortgage, and the execution creditors not having moved against the judgment by virtue of which they were made parties were also bound by the decree.

[March 12, 1884.—*Boyd*, C.]

THE plaintiff as mortgagee of the defendants by an instrument dated 30th January, 1883, purporting to be

duly executed by the company, commenced an action for the sale of the mortgaged property. The writ was issued therefor, and duly indorsed under Rule 17, and default being made by the company, judgment was obtained against the defendants under Rule 78. The proceedings were begun and carried on at Lindsay, and the judgment so obtained was that of the local registrar directing a reference to the Master at Lindsay, who was to make and take all necessary enquiries and accounts for redemption or sale of the mortgaged premises in the usual form as prescribed by G. O. Chy. 441, and by form 168 O. J. A.

This was an appeal from the Master who held that the instrument in question was not a valid mortgage, and gave the execution creditors priority over the plaintiff.

*Moss*, Q. C., and *Hudspeth*, Q. C., for the plaintiff (appellant).

*Osler*, Q. C., and *McIntyre*, contra.

The following cases were referred to: *Greenstreet v. Paris* 21 Gr. 229; *Royal Bank v. Turquand*, 5 E. & B. 248; 6 E. & B. 327; *Colonial Bank v. Willan*, L. R. 5 P. C. 417; *Bickford v. Grand Junction R. W. Co.*, 1 S. C. R. 696; *Scott v. Colburn*, 26 Beav. 276; *Re Pooley Hall Coll Co.*, 21 L. T. N. S. 690; *Australian A. S. C. Co. v. Mounsey*, 4 K. & J. 753; *Ontario Salt Co. v. Merchants Salt Co.*, 18 Gr. 555; *Re Patent File Co.*, L. R. 6 Chy. Ap. 83; *Strand Case*, 3 D. J. & G. 147; *Baker v. Dewy*, 15 Gr. 668; *McDonald v. Rodger*, 9 Gr. 75; *McDonald v. Wright*, 12 Gr. 552; *Darling v. Darling*, 15 U. C. L. J. N. S. 112; *Athenæum Co. v. Pooley*, 28 L. J. Chy. 119; *Phosphate Co. v. Green*, L. R. 7 C. P. 43; *Irwin v. Australia*. 3 A. R. 366.

BOYD, C.—Mr. Holmsted is correct in stating that in compendious references of this kind to the Master are in effect incorporated the provisions of the thirteen orders referred to in G. O. 431, that is G. O. 442 to 454, *Rules and Orders*, vol. i. p. 244. These define the practice in mortgage cases and prescribe the Master's duties in such

references. By G. O. 442, the Master is to state whether any one, and who, other than the plaintiff has any lien, charge or incumbrance upon the land embraced in the mortgage security of the plaintiff. By G. O. 444 the Master is to serve all such incumbrances with Notice T which was done in this case.

That notice sets forth that an action for sale of the lands being begun by the plaintiff the Master is directed to inquire whether any person other than the plaintiff has any charge, lien, or incumbrance upon the estate, and then after summoning the person to appear to prove his claim, he is notified that if he fails to move to vary or set aside the judgment he will be bound thereby, as if he was originally made a party to the action.

By the report in this case the Master gives priority to all the execution creditors subsequent in date to the plaintiff's mortgage, on the ground that that mortgage was not sanctioned or ratified by the shareholders of the company under sec. 85 of The Canada Joint Stock Companies Act, 1877 ; and as expressed in his reasons holds that it is not a mortgage as against and in priority to the claims of the judgment and execution creditors.

As a special circumstance he reports that these creditors being all subsequent to the making of the plaintiffs mortgage were made parties as subsequent incumbrances, but that from the evidence before him it appears that they were entitled to priority over the plaintiff.

The Master has virtually abrogated the judgment which proceeds upon an adjudication that the plaintiffs are mortgagees of the company having a lien upon their land and a right to realize the same by a sale of the mortgaged premises. And to this adjudication all the subsequent incumbrancers who are made parties in the Master's office assent, because they take no steps to move against, vary, or set aside the judgment, they were therefore bound by it in the same way as if they had been made parties originally, had made default in setting up any defence, and had suffered judgment to be recovered in favour of the plaintiff.



It seems to me impossible to hold that the plaintiff's security is as against the company a mortgage, and is as against these parties subsequently added not a mortgage—that as against the original defendants the plaintiffs had a lien upon the land enforceable by sale, and as against the defendants added in the Master's Office that the plaintiff had no lien and no right to sell the land. If the plaintiff had no mortgage and no right to sell, why did the execution creditors submit to the judgment? It was their duty to move against it, or to take independent proceedings to vacate the mortgage, if such be their rights. Upon the Master's finding it is not proper to sell the premises under the plaintiff's security, and it cannot be sold under the executions till a year has elapsed from the delivery of the writs to the sheriff. These are some of the many incongruities which arise from a departure from the practice which has been sanctioned by the highest Canadian Court of Appeal, in *Bickford v. Grand Junction R. W. Co.*, 1 S. C. R. 696, from which I quote a few passages :

“The general practice of the Court of Chancery of Ontario is, that a question such as this, the invalidity of a mortgage deed, should be raised by the pleadings and adjudicated on by the Court at the hearing of the cause. If the mortgagors are to be at liberty to say in the Master's Office that there is nothing due on the mortgage deed because it was beyond the power of the corporation to make it, why should they not also be heard to say there is nothing due because the deed was obtained by fraud? Unless some arbitrary line is to be drawn, the right of the Master, under such a reference, to enquire into the validity of the deed, would be co-extensive with that of the Court at the hearing, embracing every case in which a mortgage might be impeached upon a ground which would have entitled the mortgagor to have had it wholly set aside by decree, or to have had the mortgagee's bill for foreclosure dismissed. We know of no authority for any such delegation of the functions of the Court to the Master.” Pp. 726-7.

The parties added in the Master's office, if they submit to the decree or judgment under which they are brought in, are in precisely the same plight as the mortgagor, and cannot attack the mortgage for fraud, or as being *ultra vires*, or upon such grounds as the Master has taken into consideration in the present case. No decision cited justifies such an inconvenient practice, and certainly *McDonald v. Rodger*, 9 Gr. 75, does not.

In that there was a deviation from the ordinary practice, for the sake of convenience, but I am against extending that case, so as to allow parties to play fast and loose in the Master's office, when they come in to get the benefit of a decree. There was no attack upon the validity of the plaintiff's judgment in *McDonald v. Rodger*, but the plaintiff brought into the office an incumbrancer who appeared to be, and who would have been, prior to the plaintiff had his judgment been properly registered, and the Master held that he was in law subsequent to the plaintiff. The Vice Chancellor allowed an appeal from the Master under the circumstances, though the appellant might have applied to discharge the Master's order making him a party. But this is something very different from a successful attack upon the very instrument by virtue of which alone there is a reference, and upon the validity of which is based all the relief awarded by the judgment: *Glass v. Freckleton*, 10 Gr. 470.

Upon the merits I do not agree with the Master, although it is not necessary to dispose finally of that now in view of the further evidence which can be adduced, if a direct attack is made upon the mortgage in question. But if the judgment stands on this mortgage against the company it is impossible for execution creditors to claim any larger benefit under that judgment than the company itself has.

The mortgage in this case was executed before any judgment had been recovered against the company, and when that mortgage had passed into judgment against the company only two small executions were in the hands of the sheriff. The other executions to which, with these first

two, priority has been given over the mortgage, were all subsequent to the recovery of judgment by the plaintiff. By that judgment the mortgage was rendered unimpeachable by the company, and no execution creditor can get a higher right against the land than the company itself has. The interest of the company was an equity of redemption subject to the mortgage which carried the legal estate to the plaintiff, and that interest is the exact measure of what the execution creditor has the right to take, per Lord Chelmsford in *Wickham v. New Br. & Can. R.W. Co.*, L. R. 1 P. C. 8 App. 641.

The borrowing in this case of \$15,000 from the plaintiff was not *ultra vires*. It was required and was expended for the proper uses of the company, and it was *bonâ fide* advanced for that purpose. The security obtained in this case was not *ultra vires* the company, it was valid in form and operated to pass the legal estate in the lands to the plaintiff. The only point of objection is that it was not previously sanctioned by a two-thirds vote of shareholders as indicated in the 85th sec. I incline to think the plaintiff's security was not affected by the non-observance of this direction having regard to *Fountaine v. Carmarthen*, L. R. 5 Eq. 322; *Re City Ship Assurance Co.*, 5 Ch. 293. But apart from this the borrowing and the mortgaging were both made known to a general meeting of shareholders the next month after, the transaction was set forth in the printed annual report of the company which under sec. 87 was placed in the hands of its shareholders, more than a year has elapsed and no one entitled to do so has questioned the validity of the security or the propriety of the transaction and judgment has been recovered upon it against the company: in such circumstances the proper and only inference is, that there has been an adoption and ratification of the transaction by the company and by every shareholder: *Williams v. St. George's Harbour Co.*, 2 DeG. & Jo. 547; *Phosphate Co. v. Green*, L. R. 7 C. P. 43; *Grady's Case*, DeG. J. & S., 488; *Re British Provincial Co.*; 3 N. R. 50; *English C. S. S. Co. v. Rolt*, 17 Ch. D. 715; *Re Patent File Co.*, L. R. 6 Ch. App. 86.

It is unnecessary to go further and intimate my doubts as to the *locus standi* of creditors to attack this transaction, but to shew that these doubts rest upon very intelligible grounds, it is enough to refer to *Greenstreet v. Paris*, 21 Gr. p. 235, and *La Société de Construction du Canada v. La Banque Nationale*, 24 L. C. Jurist, p. 229.

The appeal is allowed, with costs. The priorities should be reversed, and the plaintiff declared first, unless the creditors desire to withdraw from this suit, and be discharged as parties in the Master's office, so as to leave them free for independent action. This can only be allowed on payment of all costs occasioned by their contention in the Master's office, and of this appeal.

#### HATELY V. THE MERCHANTS DESPATCH TRANSPORTATION COMPANY ET AL.

*Security for costs—Past and future—Plaintiff leaving the jurisdiction permanently pending action.*

Where a plaintiff leaves the jurisdiction permanently while his action is pending, he will be ordered to give security for costs past as well as future.

[April 4, 1883.—*Mr. Winchester*, sitting for the Master in Chambers.]

THE plaintiff at the time of commencing proceedings was resident within the jurisdiction. At the trial he was nonsuited. The nonsuit was set aside by the Divisional Court and a new trial directed. At this stage of the proceedings the plaintiff left the province. The defendant moved for security for past and future costs. The affidavits showed the costs of all defendants untaxed to be about \$3000.

*Plumb* and *Millar*, for the motion. Rule 429 O. J. A., removes any restriction which may formerly have existed with regard to the time when and the amount in which



security for costs may be ordered. *Republic of Costa Rica v. Erlanger*, L. R. 3 Chy. D. 62. A plaintiff who leaves the jurisdiction may be required to give security for costs as well past as future. *Massey v. Allen*, 12 Chy. D. 807; *Brocklebank v. Kings Lynn Steamship Co.*, 3 C. P. D. 365.

*Aylesworth*, contra.

MR. WINCHESTER.—The defendants move for an order for security for costs on the ground that the plaintiff has left the province permanently, they ask for security for those already incurred as well as prospective costs. The action was tried at the last Fall Assizes in Brantford when a nonsuit was entered, the defendants thereupon gave notice of this application which came on before *Mr. Dalton*, but in consequence of the plaintiff having given notice of motion, returnable before the Divisional Court to set aside the nonsuit, this application was allowed to stand until the motion in term was disposed of. That has been disposed of, and the defendants now renew their application. The plaintiff's counsel seeks to file a further affidavit of the plaintiff in answer to the application, this is objected to by the defendants counsel on the ground that the plaintiff being out of the jurisdiction cannot be cross-examined upon it, and authority is cited in support of such contention. It is true that if objected to, such an affidavit cannot be read unless with the permission of the Court. I am disposed to allow the affidavit, it was sworn to by the plaintiff in Chicago on the 20th November, 1882, the argument before *Mr. Dalton* being on the 18th of the same month, and I think no harm can be done in permitting it to be used. The plaintiff's counsel objects to the motion on the ground of delay in moving, and numerous authorities are cited by him in support of the contention. The cases cited are all before the Ontario Judicature Act came into force, and since which time the law as to requiring security has been considerably relaxed. In the case of *Somers v Carter*, 3 P. R. 328, it was decided by his Lord-



ship Chief Justice Draper, that the motion was not too late. In that case the defendant entered an appearance on the 13th September, 1862. On the 29th of the same month declaration was filed. On the 7th October following the defendant obtained an order for security for costs, on the ground that the plaintiff had left the jurisdiction. On the 9th of the same month the order was served. On the 11th November, 1863, the defendant obtained an order rescinding the order of the 7th October, he having come back. In October, 1863, the plaintiff again went to the United States to reside. On 21st March, 1864, notice of trial was served; on 24th March affidavits were sworn for the 2nd order for security; on the 26th of the same month security was granted. On the return of the summons, the learned Chief Justice, after reciting the facts as above set out, and reviewing a number of cases stated: "It appears to me therefore, looking at the plaintiff's delay in proceeding, at the fact that it does not appear that the defendant took any step in the interim, and considering what I take to be the principle of the cases cited that I should make this order." The present rule of Court is 429, "In any cause or matter in which security for costs is required, the security shall be of such amount and be given at such time or times and in such manner and form as the Court or a Judge shall direct." This is similar to the English Rule 55, and in a case of *Arkwright v. Newbold*, W. N. 1880, p. 59, it was held that security ought to be given. In that case the statement of defence was filed on 7th July, 1879, the plaintiff filed interrogatories, and on 14th August the defendants' solicitor wrote plaintiffs' solicitor to say defendants would apply for security for costs. After this on 6th October, 1879, the defendants put in an answer to the interrogatories. The summons for security was dated 16th February, 1880. In this present case the affidavits in support of the application state, that as soon as it came to the knowledge of the defendants or their solicitors they applied, and at any rate application was made before any proceedings were taken by them. I don't think the plaintiff's

affidavits contradict these facts sufficiently to warrant me in disbelieving them. I think therefore that the defendants are entitled to security. It is conceded by the plaintiff's counsel that if security is to be ordered it should be for past as well as future costs. This, I think is clear under *Massey v. Allen*, 12 Chy. Div. 807. The only point then is as to the amount of security. In deciding this question, the amount of costs which the defendants have already incurred, as also those to be incurred, must be considered. They no doubt are considerable. It is sworn that the past costs are \$3,280, and that a new commission must be issued to England to examine the co-plaintiff to be added. The amount will be at least \$4,000, taking the defendants own figures; the plaintiff's counsel states that this is altogether too great. However, the plaintiff's real estate in Canada should be taken against this at the value set upon it by the plaintiff, \$2,000; this value is considered too large by the defendants, but I think it only fair to give the plaintiff the same credit as to the value of his property as I give the defendants as to the amount of their costs. The usual order for security in the sum of \$1,900 will therefore go.

I have considered *Bell v. Landon*, 9 P. R. 100, and do not think it affects the question to be best decided here.

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## RE EBERTS ET AL. V. BROOKE.

*Prohibition—Division Court—Action on County Court judgment.*

Application for a prohibition to the Judge of the first Division Court of the county of Kent, and to the plaintiffs, to prohibit them from prosecuting this action, which is brought upon a County Court judgment for \$211.87, the plaintiffs abandoning the excess of their claim over \$100, and claiming \$100.

*Held*, that an inferior Court has no jurisdiction to entertain an action brought upon the judgment of a superior Court.

[April 4, 1884.—*Galt*, J.]

THIS was an application for a prohibition to the learned Judge of the County Court, of the County of Kent, and Judge of the First Division Court of the County of Kent, and to the plaintiffs in the said action, prohibiting them from taking further proceeding in said action in the said Court.

The facts and cases cited appear in the judgment.

*E. D. Armour*, for the Defendant.

*Aylesworth*, contra.

GALT, J. The circumstances of this case are very singular. The claim was originally brought by the testator of the plaintiffs many years ago, in the Division Court. After his death it was revived by the plaintiffs, and a judgment was entered for over \$200, the case was then removed by transcript to the County Court, and became a judgment of that court, execution was issued there, and has been returned unsatisfied. The present plaint is then filed in the First Division Court, and the plaintiff's claim is stated as follows: "The plaintiffs recovered a judgment against the defendant in the County Court of the County of Kent, for the sum of \$211.87, on 6th day of October, 1881, upon which no payment has been made by the defendant, and the whole of said judgment remains unsatisfied; and the defendant has refused and still refuses to fulfil his obligation under said judgment; and the plaintiffs abandon that portion of said judgment which is in excess of \$100, and the plaintiffs claim \$100 as money due upon said obligation." The case

was tried before the learned Judge who give judgment in favour of the plaintiffs for \$100, without costs.

The cases cited by Mr. Armour, of *Austin v. Mills*, 9 Ex. 288; *Berkeley v. Elderkin*, 1 E. & B. 805; *McPherson v. Forrester*, 11 U. C. R. 362; and by Mr. Aylesworth, of *Donnelly v. Stewart*, 25 U. C. R. 398, show conclusively that no action will lie in a Superior Court upon the judgment of an inferior.

But I have seen no case in which an action on the judgment of a Superior Court has been brought in an inferior; and there is this fatal objection to it, the judgment of the Superior Court cannot be interfered with by the judgment of the inferior, and therefore there would remain two judgments for the same obligation, as in the present case, there would be a judgment in the County Court for \$211.87, binding on the lands, &c. of the defendant and another judgment for the same cause of action, and *in satisfaction* of the former for the sum of \$100. This appears to me to be a conclusive reason against the jurisdiction of the Division Court in this case, and therefore that this rule should be made absolute for a prohibition.

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THE ATTORNEY GENERAL V. GOODERHAM AND  
WORTS ET AL.

*Foreign commission—Names of witnesses—Professional or expert evidence.*

An action to restrain an alleged nuisance, caused by the defendants' cattle byres in the city of Toronto.

An application by the defendants for the issue of commission to certain cities in the U. S. A., to take evidence in their behalf concerning the cattle byres in those cities.

It was admitted that the only point on which witnesses in the States could be usefully examined was, as to whether proper means had been taken by the defendants to minimize the objectionable accompaniments or incidents of their business. None of the persons sought to be examined were named in the application, nor was it sworn that such persons could not be ready to attend personally at the trial.

*Held*, upon this state of facts, that the order for the commission must be refused.

As a rule the Courts discountenance professional or quasi-expert evidence from being brought before them in writing.

[April 9, 1884.—*Boyd*, C.]

AN action to restrain an alleged nuisance caused by certain cattle byres belonging to the defendants, Gooderham and Worts, in the City of Toronto.

The defendants applied for an order directing the issue of commissions to the cities of New York, Chicago, St. Louis, and Cincinnati, to take evidence on their behalf respecting the cattle byres in those cities.

*G. T. Blackstock*, for the defendants.

*Bethune*, Q.C., for the plaintiff.

BOYD, C.—The application is not made in such a way as to recommend it. It is usual to give the names of at least some of the persons who are sought to be examined, but that is not done here, so that for this reason it is simply impossible to say that the witnesses who are required could not be ready to attend personally at the trial. And if that is the case a commission should never be ordered, for of all unsatisfactory evidence, that of experts examined under a commission is superlatively so.

It is admitted that the only point on which witnesses in the States could be usefully examined, is, as to whether



proper means have been taken by the defendants to minimize the objectionable accompaniments or incidents of their business. To possess much value, witnesses speaking on this point should see the locality, and should be able to judge from personal observation as to the operations and efficiency of what is done to counteract the alleged nuisances. As a rule the courts discountenance professional or quasi-expert evidence, from being brought before them in writing, as the witnesses should personally appear and subject themselves to cross-examination before the Judge who is to try the matters in issue. I adopt the language of Hagarty, J., in *Russell v. G. W. R.*, 3 U. C. L. J. 116, as relevant to this application and to the effect, that those who desire the opinions of persons beyond the compulsory process of Canadian courts may and should take the trouble, expense, and responsibility of procuring their personal attendance.

The same disinclination exists in England to grant commissions for the purpose of expert evidence, unless it is made very clearly to appear that so to do is essential for the further administration of justice by shewing that the required evidence is not procurable within the jurisdiction, and that competent foreigners cannot possibly be procured to attend at the trial. See *The M. Moxham*, L. R. 1, P. D. 115, and *Grant v. Baugh Faco-Egyptian*, referred to in *Spiller v. Paris Skating Co.*, 27 W. R. 226; *Mouton v. Schwitzer*, W. N. 1868, p. 161.

The application is refused, with costs in the cause to the plaintiff in any event.

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## McTAGGART V. TOOTHE ET AL.

*Appearance entered gratis—Lis pendens.*

The plaintiff issued a writ of summons, and registered a certificate of his *lis pendens* upon the lands of the defendant Toothe. The defendant not having been promptly served with the writ, and being anxious to get rid of the suit entered an appearance *gratis*.

The Master at London made an order in Chambers upon the application of the plaintiff striking out the appearance.

*Held*, upon appeal, that there is nothing in the Judicature Act or rules which interferes with the well-recognized practice that a defendant has a right to appear voluntarily, and to anticipate the service of actually issued process. Especially should his privilege to appear *gratis* be preserved in a case where his property is directly and prejudicially affected by the commencement of the action and the registration of its pendency.

Appeal allowed, with costs in the cause to the defendant in any event.

[April 15, 1884.—*Boyd*, C.]

*Hoyles*, for the defendant, Toothe, appealed from the order of the Master at London, striking out an appearance entered *gratis*. He contended the order was erroneous, and referred to *Daniell's* Pr. 350 (6th ed), *Fell v. Christ's College*, 2 Bro. C. C. 278; *Poulton v. Lee*, 7 P. R. 415. Here a certificate of *lis pendens* has been registered, and the defendant is anxious to get rid of it.

*G. M. Rae*, for the plaintiff. The plaintiff is *dominus litis*, and is entitled to take the time that the practice allows for carrying on a suit. In this case the defendant was not served, nor has any solicitor accepted service for him. The writ requires the defendant to appear ten days after service. He referred to rules S. C. 31, 33, *Oulton v. Radcliffe*, L. R. 9 C. P. 193. The plaintiff is prejudiced in his proceedings by being forced on, out of the ordinary course.

*Hoyles*, in reply, referred to *Finnegan v. Keenan*, 7 P. R. 385, as showing that in effect the registration of *lis pendens* amounted to an injunction, and the practice of the Court requires the action to be prosecuted promptly.

BOYD, C.—It was held in *Watson v. Ham*, 1 Ch. Cham. R. 295, that if a sole defendant dies before the bill is served

upon him, it is not competent for the plaintiff to revive as there was no suit in Court. The same point arose in *Meyers v. Meyers*, 21 Gr. 220, in which Spragge, C., said, "the whole practice of the Court, as now modeled by our General Orders, proceeds upon this, that a party named in a bill is a party to a suit as soon as the bill is served upon him." And he goes further than this, when he says, at p. 221: "The defendant is regarded and treated as a party, and in my judgment is a party as soon as the bill is served upon him, and perhaps in some instances before."

One of such instances is, I think, exemplified in the present case. A writ was issued, and forthwith a certificate of *lis pendens* was filed before service on the defendant. This was done pursuant to R. S. O. c. 40 sec. 90 by which it is declared that the filing of a bill, or the taking of a proceeding in which any title or interest in land is brought in question, shall not be deemed a notice to any person not being a party thereto, until a certificate is registered according to a form given in the Act. It has not been deemed necessary to serve the bill or proceedings before registering a certificate under the statute. The Act intends that in a case affecting lands there is litigation pending by the mere filing of the bill under the former practice, and by the mere issue of process under the Judicature Act. See *Robson v. Argue*, 25 Gr. 412; *Crofts v. Oldfield*, 3 Sw. 278, N. When the plaintiff proceeds to register a *lis pendens* the act becomes one *in rem* and not merely *in personam*, it affects the defendants' property; it gives notice to all the world that his title is being questioned and warns people against dealing with him till that contest is determined. In its effect it operates as an *ex parte* injunction: *Finnegan v. Keenan*, 7 P. R. 385; and a defendant may well desire in such case to have the trial accelerated.

By the Rule 31 the writ of summons is in force for twelve months from the day of its date, and service is good if made at any time during that period. This is an enlargement of the practice established by General Order Ch. 93, by which service of a bill was to be of no validity if not.

made within twelve weeks after the filing of the bill. Where, however, a *lis pendens* had been registered, and no service made within the twelve weeks it is open for a defendant to have it dismissed, and so clear the registry : *Somerville v. Kerr*, 2 Ch. Cham. R. 154. The Chancellor there observed that in his opinion a defendant before service might at any time come in the interim, and make himself a party to the suit, the bill being once on the files. In *Lush's Prac.* 3rd ed., vol. i., p. 392, it is said : "The defendant should not appear after notice not to do so, and that the writ is abandoned; but unless such notice be given, he may enter an appearance as soon as the writ is issued and waive the service, but his so doing will entitle the plaintiff to declare forthwith. To the same effect is the practice recognized by Keating, J., in *Oulton v. Radcliffe*, L. R. 9, C. P. 193, 4; and by Denman J. in the same case at p. 195. Such is also laid down as proper practice in Chancery suits in *Daniell*, 5th ed., p. 462: "A defendant may if he has been informed of a bill being filed against him enter an appearance without waiting to be served with a copy of the bill. This is called appearing *gratis*." See *Barkley v. Lord Reay*, 2 Hare 309; *Mellish v. Mellish*, 1 Sim. & Stu. 138; *Fell v. Christ's College*, 2 Bro. C. C. 278; *Bowbee v. Grills*, Dick 38. There is nothing in the Judicature Act or rules, which interferes with this well recognized practice that a defendant has a right to appear voluntarily, and to anticipate the service of actually issued process. Especially should his privilege to appear *gratis* be preserved in a case where his property is directly and prejudicially affected by the commencement of the action, and the registration of its pending. I consider that by the very terms of the Act, (sec. 52, and head note to the rules,) the practice adopted in this case by the defendant has been preserved, and the plaintiff's application should be dismissed and the appeal allowed, with costs in the cause in any event to the defendant.

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## O'DONNELL V. O'DONNELL.

*Short notice of trial—Rule 455 O. J. A.—Holiday excluded in computing time.*

Sundays and holidays are excluded in computing the five days notice necessary in short notice of trial.

Short notice of trial served on Wednesday for Monday.

*Held, bad.*

[April, 21, 1884.—*Osler, J.A.*]

*Clement* moved to set aside notice of trial. The defendant was on terms to take short notice of trial and the notice was accordingly served on a Wednesday for the following Monday.

*Aylesworth, contra.*

THE MASTER IN CHAMBERS was of opinion that the notice was irregular, as under Rule 455 (O. J. A.) which was held to apply to the case of a short notice of trial, Sundays (and other holidays) should be excluded. Owing, however, to an affidavit being filed suggesting that the defendant had agreed to take any notice, and to go down to trial in any case, the application was enlarged to come before the learned Judge who should take the St. Catharines Assize. The application accordingly came before,

OSLER, J. A., who held the notice irregular, and set it aside without costs.

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## MILLETTE V. LITTLE.

*Privileges of witnesses— Answers tending to criminate husband and wife.*

In an action of libel against a husband as the writer of libellous articles, and as editor of a newspaper in which they were printed, and his wife as owner and publisher of the newspaper. On examination after issue joined in the action, the husband refused to answer questions as to the ownership of the newspaper on the ground that his answers might tend to expose his wife to a criminal prosecution for publication of the libels, and the wife refused to answer questions as to the authorship of the newspaper articles in question, and as to the editing of the newspaper, on the like grounds as to her husband.

*Held*, on appeal, that defendants were justified in their refusals.

[April 21, 1884.—*Galt*, J.]

THIS was an action of libel, in which defendants, who were husband and wife, were charged to be respectively editor and proprietor of the newspaper in which the libellous articles were published. The defendants in their statement of defence denied publication.

After the close of the pleadings they were examined for purposes of discovery, and on the examination the husband declined to answer all questions as to the publication of the alleged libels—as to who had written them, or who edited, owned, printed, or published the newspaper, on the ground as to the ownership and publication of the newspaper—that the answers might tend to expose his wife to criminal prosecution on a charge of libel. And as to the writing of the articles and editing of the newspaper, that his answers might in like manner tend to criminate himself.

The wife also refused to answer the like questions on similar grounds. The plaintiff applied to strike out the defence for failure of defendants to comply with the order to examine.

The Master in Chambers held that each defendant was justified in the refusal to answer questions that might criminate himself or herself, but that the privilege of the witness extended no further, and ordered the defendants to attend again before the examiner at their own expense, and that each should answer the questions objected to,

except where the answer might tend to criminate himself or herself, and that defendants pay the costs of the application and re-examination, or in default that the defence be struck out. The defendants appealed.

*Aylesworth*, for defendants, contended that in a civil proceeding a witness could not be compelled to criminate the wife or husband of the witness, citing *Roscoe's Nisi Prius*, 14th ed., p. 168; *Wharton's Law of Evidence*, secs. 397, 402; *Rex v. Cliviger*, 2 T. R. 268; *Rex v. All Saints, Worcester*, 6 M. & S. 194; *Lamb v. Munster*, 10 Q. B. D. 110.

*Shepley*, for the plaintiff, argued that as the evidence of wife or husband could not be used against the other in any criminal proceeding, no reason for the claim of privilege existed, and that in a civil proceeding such as this, wife and husband were each competent and compellable witnesses against the other, citing, in addition to the cases above mentioned, *Rex v. Bathwick*, 2 B. & Ad. 647; *The Evidence Act*, R. S. O., ch. 62, secs. 4, 5 and 8.

GALT, J., allowed the appeal, rescinded the order of the Master, and dismissed plaintiff's application to strike out the defence, holding that the privilege of declining to answer questions of an incriminating tendency was based not merely on the fact that answers so given might, in other proceedings, be used as admissions against the party giving them, but also on any danger of criminal prosecution which the witness honestly and justifiably apprehended his answer might expose him to. And holding that the witness's privilege of refusing to answer, extended to cases where the danger so apprehended was the criminal prosecution of the wife or husband of the witness.

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## FRIENDLY V. NEEDLER.

*Division Court jurisdiction—Prohibition—Discretion.*

A., entered a notice disputing plaintiff's claim in a Division Court suit, and objecting to the jurisdiction of the Court, but did not appear at the trial when the Junior Judge of the county of York, upon proof of the plaintiff's claim, and such facts as in the absence of proof to the contrary established a *prima facie* case of jurisdiction entered a judgment in favour of the plaintiff for \$44.75. On motion for prohibition on the ground of want of jurisdiction.

*Held*, following *Archibald v. Bushey*, 7 P. R. 304, that the granting of prohibition under the circumstances was discretionary: that it would be unfair to place upon the Judge trying the case, the burden of cross-examining the witnesses to ascertain jurisdiction: that if a *prima facie* case of jurisdiction is made out the defendant is himself to blame if it is not displaced: and as neither a good defence on the merits was shewn, nor dispatch used in making the application, the motion was refused with costs.

[April 29, 1884.—*Rose, J.*]

THIS was a motion for prohibition to the plaintiff and E. H. Duggan, Esq., Clerk Tenth Division Court of the County of York.

The facts appear in the judgment.

*W. Read*, for the motion.

*Hands*, contra.

ROSE, J.—The action was commenced by summons, dated 21st February, 1884. The defendant put in a notice disputing the claim and jurisdiction. The case came on for trial before his Honor J. E. McDougall, Esq., Junior Judge, County of York, on the 26th March. The defendant did not appear. Evidence was given which satisfied the learned Judge that the goods were sold and term of credit had expired, and that he had jurisdiction to entertain the suit. He accordingly gave judgment for the plaintiffs for \$44.75 and costs. On the 12th of April following, a transcript was ordered and sent to the Division Court Clerk at Orillia, and execution issued thereon. On the 16th of April notice of motion for prohibition was served for 25th April, on which day it came on for hearing. As the defendant did not lay before me any evidence of what had taken place at the trial, and the plaintiff's affidavit was not as full as I desired, I requested the

learned Judge before whom the case was tried to furnish me with a report of the trial, which he has very kindly done. From his report some of the above facts have been taken. The report is as follows: "In this matter I have perused the papers. I find there was nothing on the face of the proceedings that would indicate want of jurisdiction, except the notice raising the question. Country merchants every day come to the city and purchase goods, and direct them to be shipped by rail to their place of business in the country. The defendant did not appear at the trial. The plaintiff proved his claim and stated such facts, that in absence of proof to the contrary, established *primâ facie* that there was jurisdiction."

I have carefully perused the affidavits, and may be allowed to adopt the language of Hagarty, C. J., in *Archibald v. Bushey* 7 Pr. R. 305, to express my view of the defence on the merits. In that case he said: "On this application the statement of the possible existence of a meritorious defence is of the most shadowy character." He adds: "Unless I am bound to grant the writ *ex debito justitiæ*, I am satisfied I should refuse it." He then proceeds to refer to the judgment of Gwynne, J., in *Robertson v. Cornwall*, 7 Pr. R. 297, reported in same volume, and adopts his opinion, "that where nothing appeared on the face of the proceedings to shew a want of jurisdiction, and the objection only arose on the shewing of certain facts as to residence of defendants, and local origin of the cause of action, it was discretionary to refuse the writ after judgment below, the facts being only brought forward after such judgment." The learned Chief Justice refused the application. In *Haggart v. Coil*, reported in a note to *Archibald v. Bushey*, the same learned Judge dismissed a summons for prohibition with costs, where the defendant had not in his notice of defence objected to the jurisdiction, and had not appeared at the trial. In the case before me, a perusal of the affidavits does not convince me that there is any defence on the merits. The time has expired which the defendant claimed as the period of credit, and I am more than doubt-



ful if the period of credit had not expired before action brought. On the merits I should not interfere to assist the defendant to get in a further defence. As to the jurisdiction, I think it most unfair to the Judge below to seek to place upon him the burden of examining or cross-examining the plaintiff's witnesses to ascertain whether or not the Court has jurisdiction. What facts appeared before him in this case I am unable to say. No record of the evidence has been kept. The learned Judge reports that such facts were brought before him in evidence as established a *primâ facie* right to succeed, the defendant has himself to thank if such *primâ facie* case was not displaced. Such motions seem to me vexatious. The defendant's solicitor must have known from the summons the date of the trial, and he waited for three weeks after the trial before this application is made, the plaintiff in the meantime ordering the transcript and execution thereon.

There remains yet the question raised as to the form of the application. The prohibition is asked to restrain proceedings in York. The transcript had at the date of application been issued to Simcoe. It is contended that the application should have been not as to York but to Simcoe. I have not examined this question: it seems to have some weight. I was referred to *Wiltsey v. Ward*, 9 Pr. R. 216; reference may also be made to *Roberts v. Humby*, 3 M. & W. 120; *Robinson v. Lenaghan*, 2 Ex. 333; *Kimpton v. Willey*, 9 C. B. 719; *Graham v. Smart*, 18 U. C. R. 482. I express no opinion on this point.

I think these applications should be discouraged. The Division Court Act provides means for having cases, entered by mistake in the wrong division, transferred to the proper one, and if defendants content themselves with putting in a notice raising the question of jurisdiction, and trusting to fortune to save them from an adverse judgment, I think they may well abide the result.

I think I will be best serving the interest of suitors, and the proper administration of justice, by dismissing this motion, with costs.

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## NEW YORK PIANO CO., v. STEVENSON.

*Notice of trial—Revivor.*

The original defendant dying *pendente lite*, the plaintiffs issued an order of revivor on the 22nd April, and served it on the defendants by order on the same day, and along with it a notice of trial for the 5th May, at Cornwall.

The defendant moved to set aside the notice of trial as irregular.

*Held*, that the order of revivor was in force from its service, and as it would be confirmed by the lapse of twelve days upon the 4th of May, the notice of trial for the 5th of May was regular.

[May 3, 1884.—*The Master in Chambers.*]

THE original defendant to this action having died *pendente lite*, the plaintiffs issued an order reviving the action in the name of his executors, on the 22nd of April, 1884, and on the same day served the order on the executors, and along with it a notice of trial for the Cornwall Assizes, beginning on the 5th of May following.

The defendants moved to set aside the notice of trial on the ground of irregularity, contending that the plaintiffs were not in a position to give notice of trial until twelve days after the issue of the order of revivor, when that order would be confirmed, if not then moved against.

*Holman*, for the motion.

*Hoyles*, contra.

THE MASTER IN CHAMBERS.—I cannot see anything irregular in the notice of trial given by the plaintiffs. It was served with the order of revivor on, and (as to some of the parties,) before 22nd April, for a trial to take place on 5th May—that is thirteen days afterwards—so that the twelve days mentioned within which the parties could move against the order, expired before the day of trial. The parties are under no disability, and the order was in force from its service: *Daniell's Chy. Prac.*, 5th ed., p. 1,380 et. seq.; *Charlton v. Dickie*, 13 Ch. D. 160, and the notes to *Taylor & Ewart's O. J. A.* 359.

As to the reason given in Mr. Stevenson's affidavit for

not being ready to go to trial, as is pointed out to me, the notice of motion has no reference to any such thing. This may point to a state of facts in which it would be very proper to put off the trial, and I am sorry that the time at which all this occurs gives no opportunity to enlarge for the purpose of information on the point. All I can do is to discharge this motion as it is put, and reserve leave to the parties to apply to the learned Judge at the trial to postpone on the grounds mentioned in Mr. Stevenson's affidavit.

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## FEDERAL BANK V. HARRISON.

*Counter-claim—Surety—Indemnity.*

An action against the defendant on his bond as surety for H. & McT. for the amount due the plaintiff by H. & McT. on their banking account with the plaintiffs. Counter-claim by the defendant against the plaintiff and H. & McT., alleging that the defendant is liable only as such surety, and that the plaintiff ought to resort to H. & McT. to enforce payment from them, and that H. & McT. should be ordered to pay the amount, and indemnify the defendant.

As the counter-claim was not rested upon any particular agreement, but was set up as arising from the position of the parties as creditors, principal debtor, and surety. It was held bad, and ordered to be struck out.

[April 28, 1884.—*The Master in Chambers.*]

[May 12, 1884.—*Rose, J.*]

A motion to add third parties.

The facts appear in the judgment.

*Holman*, for the plaintiffs.

*Aylesworth*, contra.

THE MASTER IN CHAMBERS.—I have not the statement of claim before me. Neither party, I suppose, thought that any thing turned upon the particular terms of it. I only know in general that it claims from the defendant on his bond as surety of Harrison and McTaggart, the amount due on their banking account with the plaintiffs. It is the defendant's counterclaim that is objected to. It states that

his only liability is as such surety, and that upon default of Harrison and McTaggart the plaintiffs "ought," in order to indemnify and save harmless the defendant, to resort to Harrison and McTaggart to enforce payment from them, but the plaintiffs have neglected and refused to do so. Defendant further states that it is the duty of Harrison and McTaggart to pay to the plaintiffs their indebtedness to the plaintiffs, which latter proposition no one can doubt, and so to indemnify the defendant, but that Harrison and McTaggart have hitherto failed to do so. And the defendant therefore claims that Harrison and McTaggart should be ordered forthwith to pay the amount and indemnify the defendant against the same. The duty of the plaintiffs as above alleged is not founded upon any particular agreement of the plaintiffs to perform that alleged duty, but is stated, as I understand, as the manifest legal duty arising from the circumstances and the position of the parties as judgment creditors, surety, and principal debtors.

As this is a counterclaim it would be enough to say perhaps that nothing is sought from the plaintiffs, but the statements afford no defence of any kind. There is no duty on the plaintiffs to proceed against the principal debtors. There is a duty on the defendant to indemnify the plaintiffs. The defendant can if he desire it proceed under Rule 108. Harrison and McTaggart may not appear in that case, it is true, but if the defendant desires to proceed actively against them, he can settle with the plaintiffs, and then maintain a suit in equity against the principal debtors to compel them to indemnify him, the defendant. I know of no rule in the Judicature Act by which he can, against the will of the plaintiffs, compel the "joining" of Harrison and McTaggart as defendants in this suit. The plaintiffs may have very sufficient reasons for not wishing to join the principal debtors, one of them has left the country. There is, it seems to me, a remedy which the defendant has, even before a settlement with the plaintiffs by the defendant founded on the case of *Cunningham v. Lyster* in 13 Gr.575.

which indeed shows merely a well known equity jurisdiction. And to that he can address himself if advised, but as to this motion I must set aside the counterclaim with costs, because the defendant cannot by this means foist these additional defendants upon the plaintiffs against the plaintiffs' will.

An appeal was brought on before Rose, J., in Chambers, and argued by the same counsel.

ROSE, J.—This is an appeal from the judgment of the learned Master, refusing to make an order adding third parties. I thought on the argument that on the case as before the Master the appeal could not succeed, but as Mr. Aylesworth urged that the surety had the right to come into Court to compel the creditor to sue the principal debtor, the debt being due, and therefore that this case was distinguishable from *Lockie v. Tennant*, 5 O. R. 52, and the cases there cited, on the ground that the plaintiffs were interested parties, and asked to amend so as to set up a claim on such right, I reserved judgment. I was anxious if I could to make the order, as it may be great hardship will ensue if the surety is compelled to pay the debt which, he suggests the principal debtors can pay. I find upon looking at the cases cited, viz: *Boulton v. Stubbins*, 18 Ves. Jr. 20; *Wright v. Simpson*, 6 Ves. Jr. 714; *Nisbet v. Smith*, 2 Brown, 581; *Rees v. Berrington*, 2 Ves. Jr. 540; *Cunningham v. Lyster*, 13 Gr. 575; *Snell's Eq.* 483; *Central African Trading Co. v. Grove* 40 L. T. N. S., 540; *Brandt on Suretyship*, 290, sec. 205; *Ranclough v. Hayes*, 1 Vernon 189; *Antrobus v. Davidson*, 3 Merrivale, 569-79; *In Re Babcock*, 3 Story, 393; that there is no authority going to the length claimed. The law seems to be that the surety can come into Court, and compel the creditor to take such proceedings against the debtor as may be necessary to protect the surety, he, the surety, giving indemnity to the creditor by bringing the amount of the debt into Court or otherwise as may secure him against risk,

delay, or expense, or he may take proceedings against the debtor to compel him to pay the debt, and may join the creditor as a party to receive it, and this, although the creditor may not have threatened to sue the surety, on the ground that the surety is entitled to be relieved from the liability which otherwise might be kept hanging over his head indefinitely. The right of the creditor to proceed against the surety apart and distinct from the debtor is clear, and as it is said in *Wright v. Simpson*, 6 Ves. Jr. 714, it is the surety's and not the creditor's duty to see that the debtor pay. I do not see how in an action by the creditor against the surety, I can make the debtor a party defendant against the will of the creditor. It might delay the creditor or embarrass him, and as the surety can protect himself by an independent and contemporaneous action which possibly may reach a conclusion prior to the termination of this action, I do not feel justified in interfering.

I think the appeal must be dismissed.

The respondents must have their costs.

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## PERRY V. PERRY.

*Action on covenant in mortgage—Setting aside service of writ—Ontario Mortgage Act, 1884.*

The plaintiff gave to the defendant a notice of sale under the power of sale in a certain mortgage, and also began an action against the defendant upon the covenant for payment contained in the same mortgage. The notice of sale was dated 2nd May, the writ was issued on the 3rd May, and both were served on the defendant on the 3rd May. No order was obtained permitting the action to be commenced. Upon motion to set aside the service of the writ as contrary to the provisions of the Ontario Mortgage Act, 1884, 47 Vict. ch. 16, O.

*Held*, that the object of the statute is to prevent all other proceedings while the notice of sale is running, and it is not necessary under the statute, to fulfil the very words of it, that one of the acts should be prior to the other.

Service of writ set aside with costs.

[May 23, 1884. — *The Master in Chambers.*]

AN action upon the covenant for payment in a mortgage.

*Miller*, for the defendant, moved to set aside the service of the writ of summons, and to stay proceedings in the action, on the ground that it had been commenced in violation of the provisions of the Ontario Mortgage Act, 1884, 47 Vic. ch. 16, Ont.

*Malloy*, for the plaintiff, shewed cause.

THE MASTER IN CHAMBERS.—The notice of sale is dated on 2nd May, The writ was issued on 3rd May. *Both* were served on the defendant on the 3rd May.

The effect of the statute is, that where pursuant to a proviso in the mortgage there has been made or given any demand of payment or notice of sale, *no further proceedings at law or in equity* and no suit or action to enforce such mortgage shall, until after the lapse of the time mentioned in the demand or notice, be commenced or taken, unless an order of a Judge shall be first obtained permitting such suit or action.

Now this is within the very words of the Act—and its spirit. The notice was dated the 2nd, the writ issued on the 3rd, and both were served on the 3rd. Then a notice

has been *given*, and a further proceeding at law *had*, before the lapse of the time mentioned in the notice, and a suit has been commenced before such lapse of time, without any Judge's order authorizing the same.

It ought not to be supposed by any one that serving the two papers together could defeat the Statute. The very object is to prevent all other proceedings while the notice is running. It is not necessary under the Statute to fulfil the very words of it that one of the acts should be prior to the other. Both acts may be done together and yet the Statute be violated. I must set aside the service of this writ, with costs; and I stay all proceedings in this suit upon payment of the debt and interest and of the costs of the writ, but without any costs of the copy or service of the writ, and without allowance of any costs of the notice.

The costs of this application to be set off, so far as they will go, against the plaintiff's costs.

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### RE YOUNG v. MORDEN.

*Division Court—Prohibition—Increased jurisdiction—Excess over \$200—  
43 Vic. c. 8. (O.)*

In an action in the Ninth Division Court of the County of Hastings, on a promissory note for \$200 and interest, the learned Judge who tried the case (the Junior Judge of the county) entered judgment for \$200, the amount of the note, \$7.17 accrued interest and costs.

*Held*, on a motion for prohibition, that the wording of the statute is clear, namely, "all claims for the recovery of debt or money demand the amount or balance of which does not exceed \$200," and the motion was granted: *McCracken v. Creswick*, 8 P. R. 501, and *Widmeyer v. McMahon et al.*, 32 C. P. 187, referred to and distinguished.

*Held*, also, that as the learned Judge who tried the case does not allow County Court costs in similar cases, and as the plaintiff was obliged to sue in the Division Court at the risk of prohibition, or in the County Court, and lose his costs, that the defendant should get no costs of this motion, unless he successfully resists the suit to be subsequently brought to recover the amount of the note.

[May 30, 1884.—*Rose, J.*]

THIS was a motion for an order for a writ of prohibition to be directed to the Junior Judge of the county

of Hastings, in this matter tried in the Ninth Division Court of the county of Hastings.

The facts appear in the judgment.

*Shepley*, for the motion.

*Aylesworth*, contra.

ROSE, J.—The action in the Division Court was brought to recover the amount of a note for \$200 and interest and the learned Judge entered judgment for \$200 amount of note and \$7.17 accrued interest and costs.

It is contended that the learned Judge had no power to enter a judgment for any sum in excess of \$200, the jurisdiction of the Division Court being limited to that sum. Counsel for the plaintiff cited and relied upon *McCracken v. Creswick*, 8 P. R. 501, followed and approved in *Re Widmeyer v. McMahon et al.*, 32 C. P. 187. I have examined these cases with care, as it seemed to me the plaintiff's contention was not valid and could not be supported. Indeed I imagine that counsel for the plaintiff had not been able to satisfy himself of the correctness of the proposition he was instructed to advance.

The cases cited are no authority for the proposition: In *McCracken v. Creswick*, Hagarty, C. J., says that, "The cause of action on the note, was clearly ascertained by the defendant's signature. When defendant signed it, we must consider he did so subject to the payment of interest so long as it was over due, in other words, he promises to pay a named sum, and so long as that sum remained unpaid the law declares the payee to be entitled to interest as a legal consequence." In the preceding sentence the learned Chief Justice says: "I cannot understand why the Judge could not allow the ordinary interest so long as the total was within his extended jurisdiction." Again, "I see no reasonable doubt but that interest would be recoverable to any amount so long as the whole did not exceed \$200." In *Re Widmeyer v. McMahon*, Wilson, C. J., refers to *McCracken v. Creswick*; as follows: "There

the learned Chief Justice of the Queen's Bench Division, held in an action on a promissory note for \$73.14, principal money sued upon in the Division Court, payable with interest at seven per cent., that the inclusion of interest in the judgment which made it exceed \$100, by \$3.44, did not put the recovery beyond the jurisdiction of that Court because not only the original claim but the interest included did not exceed \$200, and that in such a case interest was recoverable by law."

The case of *Burns v. Rogers*, a decision of McDonald, Co. J., Leeds and Grenville, reported in 17 C. L. J. N. S. 209, was also referred to. The head note of that case is as follows: "Held, that an action to recover a balance of over \$100 and less than \$200 upon a promissory note which had been protested might have been brought in a Division Court, even though the notarial fees formed a part of the amount claimed by plaintiff." The learned Judge says in his judgment that he has arrived at a conclusion different from that of the then County Court Judge of York and the County Judge of Hastings. I am not aware that the question as to notarial fees has been further considered, and it is not necessary to express any opinion as to whether they stand on the same footing as interest, as the learned County Court Judge says: "The amount of the notarials is given to him by the statute, and I look upon it as a sort of accretion to his claim, which is not to be considered in deciding as to whether an action could have been brought in the Division Court *unless indeed the amount of such notarials carries the whole amount of the claim beyond \$200.*" And therefore this case is no authority in the plaintiff's favour.

The wording of the statute is clear: "All claims for the recovery of a debt or money demand, *the amount or balance of which does not exceed \$200.*" And I would not have thought it necessary to give my reasons so fully had it not appeared at the argument<sup>t</sup> that, consistently with the decision in this case, the same learned Judge refuses to allow County Court costs in actions on notes for \$200

when the amount of principal and interest exceeds \$200.

In my opinion the order asked for must go, the defendant to have costs in case he successfully defends the action whether brought again in the Division Court for the amount of the note without the interest, or in the County Court for the note and interest. If the plaintiff eventually succeeds, there will be no costs of this motion, as it appears that he could have brought the action in the County Court at the risk of getting only Division Court costs, and in the Division Court at the risk of a prohibition.

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RE FITZGERALD, A SOLICITOR.

*Bill of costs—Delivery and taxation—Præcipe order.*

Upon a motion in Chambers for an order for the delivery and taxation of a solicitor's bill of costs relating to certain proceedings under mortgage. *Held*, that the Chancery practice of obtaining such orders on præcipe is the more convenient one, and should prevail in all divisions of the High Court of Justice.

Order made with costs as of a præcipe order.

[June 3, 1884.—*The Master in Chambers.*]

*Holman* moved on notice, for an order that the solicitor do deliver his bill of costs in all causes and matters wherein he had been concerned for the applicant, and that the said bill of costs, when delivered, be referred to one of the Local Masters for taxation.

*Clement*, for the solicitor, objected that the order might have been obtained on *præcipe*, and that the costs only of a *præcipe* order should be allowed to applicant.

*Holman* pointed out that Judicature Rule 444 only provided for obtaining orders on *præcipe* for taxation when the bill had already been delivered, and that sec 40 of the Attorneys Act provided that when the bill had not been delivered, an application might be made to the Court or



Judge to compel delivery. Though a practice had prevailed in the Chancery Division, prior to the Judicature Act, of granting orders for delivery on *præcipe*, the practice in the Common Law Divisions had been otherwise, and it had always been necessary in those divisions to apply in Chambers for an order for delivery, and that since the Judicature Act came into force the Registrars of the Common Law Divisions had not granted *præcipe* orders for delivery. The costs in the matter related to certain proceedings under mortgage, and were not incurred in any Division. As questions frequently arose as to whether the solicitor was the solicitor for the applicant, and whether or not the bills of costs were taxable under the Act, the practice that had hitherto prevailed in the Common Law Divisions was the better practice.

THE MASTER IN CHAMBERS.—*Held*, that the obtaining of orders on *præcipe* was the better practice, and should prevail in all divisions. He made the costs of the application to the applicant as of a *præcipe* order, and to the solicitor as of a chamber application.

*Order accordingly.*

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## HILLIARD V. ARTHUR.

*Judgment—Rule 270 O. J. A.*

The plaintiff not appearing at the trial, which took place at the Picton Assizes, before Patterson, J. A., judgment was directed to be entered for the defendant, with costs.

Application was subsequently made to the Judge at the same Assizes to set aside the judgment and reinstate the case on the list. This was refused, the plaintiff not being then ready to go on. Application was then made by the plaintiff to the Master in Chambers under Rule 270 O. J. A., to set aside the judgment entered at the trial. This motion was enlarged before Rose, J., in Chambers, who  
*Held* that Rule 270 O. J. A. does not give jurisdiction to the Master or a Judge in Chambers in such cases.

[June 3, 1884.—*Rose, J.*]

MOTION to set aside a judgment in favour of the defendant.

The facts appear in the judgment.

*Clement*, for the motion.

*Aylesworth*, contra.

ROSE, J.—This is a motion in Chambers by plaintiff, under Rule 270, to set aside judgment entered for defendant by Paterson, J.A., at Picton Sittings. It appears that the plaintiff was not ready to proceed, his witnesses not being present. Application was made at the Sittings to the learned Judge who entered the judgment, to set aside the judgment and reinstate the cause on the list, but this motion was unsuccessful as the defendant could not recall his witnesses who had left the town.

The plaintiff then gave notice of motion returnable before the Master in Chambers. Objection was taken as to his jurisdiction, and as I was sitting in Chambers he enlarged the motion to be heard by me.

1. Upon the argument it was objected on behalf of defendant that a Judge in Chambers had no jurisdiction to entertain it.

2. That a motion having been made before the Judge at the Sittings could not be renewed before another Judge.

3. That as the judgment was entered in the absence of witnesses, the plaintiff appearing by counsel and objecting, the case did not come within rule 269.

Rule 268 provides that "If when an action is called on for trial the plaintiff appears and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him." Rule 269 provides for non-appearance of plaintiff, when the defendant is entitled to judgment dismissing the action, but if he has a counter claim he may prove such claim so far as the proof lies upon him.

Rule 270 provides that "Any verdict or judgment obtained when one party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit; such application may be made at the Assizes or Sittings at which the trial took place, or in Toronto."

The verdict or judgment thus obtained, it will be observed may be either for plaintiff, or for defendant on counter-claim after full proof of claim.

No authority has been cited for such an application, and I have found none. I must, therefore, as best I can, ascertain the meaning of the Legislature from the language of the rule itself. It will be observed that the application is to be made to the Court or a Judge; then follows the direction as to place of application, either at the Assizes or Sittings at which the trial took place, or at Toronto. The literal reading would shew that the Court or a Judge may be either at the Assizes or in Toronto. If that is the reading then it must have been in contemplation that the trial might be before the Court or a Judge thereof. If before the Court, then the application should be made to the Court, if before a Judge then to the Judge.

If, however, both "Court" and "Judge" are not to be used with reference to the trial, then the natural meaning would seem to be that the Judge at the trial may hear the application, or the Court in Toronto.

On neither of these constructions is the Master or a Judge in Chambers given jurisdiction.

It may well be that the intention was to enable the party to apply to the Judge at the trial when the facts were fresh, and when possibly the case might be heard without much expense, but if the party neglected to make such application or having made it, failed, then to leave the application for the Court.

I cannot take the responsibility of deciding that an application of so important a nature, which may involve the review of the action of a Judge at the Sittings for trial of causes, can be made in Chambers, either to the Master or a Judge. If such a construction is to be given to the section, I think it more prudent to permit the plaintiff to obtain it after careful argument before the full Court.

I have not overlooked the expressions "a Judge" in Rule 270, and "the Judge" in Rule 271 and following sections, and I am fully conscious that the construction I have placed upon the section may seem somewhat arbitrary. It is however, I venture to think more in accordance with the spirit of the Act than the construction contended for by the plaintiff. I was referred to the case of *Morrison v. Taylor*, 46 U. C. R. 492. The decision in that case is with reference to the peculiar language of rule, and does not so far as I can see assist in determining this case.

In the view I take of the matter it is not necessary to consider the remaining objections.

The application must be refused, and I think with costs.

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## MOORE v. MOORE.\*

*Alimony—Costs—32 Vic. (O.) ch. 18, sec. 2.*

An application to compel the defendant to pay the costs of the plaintiff's solicitors of an action for alimony.

The action was settled before trial, the plaintiff returning to live with the defendant, and the defendant agreeing to pay the plaintiff's solicitors' costs.

*Held*, that before the Act 32 Vic. (O.) ch. 18, (R. S. O. ch. 40, sec. 48,) the defendant would have been liable to pay costs.

*Held*, under the wording of section 2 of the above Act, that the plaintiff had not *failed* to obtain a decree for alimony, and that the defendant is therefore liable to pay costs.

[June 17, 1884.—*The Master in Chambers.*]

THIS was an application to compel the defendant to pay the costs of this action to the plaintiff's solicitors.

*Hoyles*, for the plaintiff.

*H. Cassels*, for the defendant.

The facts appear in the judgment.

THE MASTER IN CHAMBERS.—It is a suit for alimony, and before trial the defendant and the plaintiff agreed to a settlement of the suit, the plaintiff returning to live with the defendant, and upon that settlement the defendant agreed to pay the plaintiff's solicitor's costs. He now refuses to pay anything but the disbursements by the solicitors. I am clearly of opinion that the defendant promised to pay these costs. It is denied, but I think that is the truth.

Certainly, before the Ont. Stat., 32 Vict. ch. 18, the defendant would have been liable beyond all question to pay these costs. See *Wells v. Wells*, 3 Sw. & Tr. P. & D. Reps. 593; *Cooper v. Cooper*, 3 Sw. & Tr. P. & D. Reps. 392; *Countess of Portsmouth v. Earl of Portsmouth*, 3 Adams Eccl. Reps. 64; *McKay v. McKay*, 6 Gr. 383; *Ex parte Moore*, 1 DeGex. B. R. 173.

The second clause of the statute is in these words: "In

\* See *Ringrose v. Ringrose*, p. 299.



no suit for alimony, in which the plaintiff fails to obtain a decree for alimony, shall any costs be decreed to be paid by the defendant beyond the "amount of the cash disbursements properly made by the plaintiff's solicitors."

Now, clearly the plaintiff has not obtained a decree for alimony in this case, but has she "*failed*" to obtain such a decree? There has been no trial, or attempted trial, and a party cannot *fail* to procure a thing except upon an attempt to procure it. There has been no such attempt here. The defendant yielded to all that the plaintiff sought before the occasion for a trial, "which took away of course all necessity for a trial. So that in propriety of language the plaintiff cannot be said to have "*failed*," and the statute has no application to the present case. Besides, it was a part of the terms of settlement that defendant should pay these costs. But without that latter I think the defendant is liable, just as he would have been liable had no such statute been passed, and I therefore make the order, with costs of this motion.

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### LUNEY V. ESSERY.

*Reference—Official Referee—Special findings—Objections to—Sec 47 and 48 O. J. A.*

At the trial of this action a compulsory order of reference was made, referring "all questions arising upon the pleadings in this action between the parties, including all questions of account, (if any)," to an Official Referee "for enquiry and report."

*Held*, that this was a reference under sec. 47 O. J. A., and not one under sec. 48, and the Referee having made a general finding by his report, (set out in the statement,) the case was referred back to him to give specific findings.

*Held*, also, that objections to special findings in a report must be raised by notice of motion.

[July 8, 1884.—*Rose, J.*]

AN action under the Mechanics' Lien Acts.

This was a motion for judgment on the report of Mr. John Winchester, an Official Referee.

The order of reference is set out in the judgment. The report was as follows :

In pursuance of the judgment herein, dated the tenth day of April last, I have, in the presence of the solicitors of the parties, proceeded with the reference therein directed, and find as follows :

1. The defendant was, at the commencement of this action, and still is, indebted to the plaintiff for the work and materials referred to in the pleadings in the sum of \$256.53, being the balance which I find upon the taking of the accounts between the parties to be payable forthwith.

2. The plaintiff is entitled to a lien on the premises in the pleadings mentioned for said sum, together with the costs of the action and the reference before me.

3. I find specially at the request of the defendant, that he conveyed the said premises to his brother, L. E. Essery, after the commencement of this action, and the registration of a certificate in the proper registry office of the institution of said action.

4. I certify specially at the request of the plaintiff, that in my opinion he is entitled to the full costs of this action, and the reference before me.

All of which I humbly certify, and submit to this honorable Court.

(Signed) JOHN WINCHESTER, Official Referee.

*Shepley*, for the defendant, objected that the finding or report was general and not specific as to each question arising under the pleadings, as required by section 47 O. J. A.

*Watson*, for the plaintiff, contended that the reference was under section 48, and that the report must be accepted, as the finding of a jury, and not having been moved against must stand. 2nd. That if under section 47, the defendant not having taken his objection by motion against the report, could not be heard to urge it on this motion.

ROSE, J.—It is admitted that the reference is under either section 47 or 48, neither counsel contending that it was a reference under the C. L. P. Act. It will be neces-

sary first to determine under which section the reference was made.

The order was made at the trial, apparently not by consent, but compulsorily, by the learned Chief Justice of Ontario, then sitting as Chief Justice of the Queen's Bench Division.

It is in the following terms :

"This action coming on for trial before the Court this day, upon hearing read the pleadings herein, and the evidence of witnesses examined on behalf of the plaintiff, and upon hearing counsel for the parties, it is ordered that all question arising upon the pleadings in this action between the parties, including all questions of account, (if any), be and the same are hereby referred to John Winchester, Esquire, an Official Referee, for enquiry and report. And it is ordered that the costs of the day other than witness fees, be costs in the cause, and that the plaintiff herein do pay forthwith to the defendant the sum of ten dollars, as his witness fees of the day.

"Dated this tenth day of April, 1884.

"JOHN H. HAGARTY, C. J."

It is thus apparent that the reference was of all questions arising upon the pleadings, including all questions of account, (if any), for inquiry and report, and not for trial.

In *Longman v. East*, 3 C. P. D. 142, referred to at much length in *Cumming v. Low*, 2 O. R. 499, it was decided p. 149, that under sec. 57, (O. J. A., s. 48.) "All that can be done is, in a case where there is no consent, the Judge can refer issues of such a character as are mentioned, that is to say, where they require any prolonged examination of documents or accounts, scientific or local investigation, which could not conveniently be made before a jury.

\* \* But there is no power to refer the action, only questions or issues of fact, and where there is no consent, it is only issues of facts of the particular character enumerated that can be referred, unless possibly some other issue of

fact was so mixed up with them that it could not practically be dissevered."

It is clear, looking at the order made herein, that not only are questions of account referred, but all questions arising in the action, which is an action to enforce the plaintiff's rights under the Mechanics' Lien Acts, the plaintiff having built a house for the defendant, and many questions of fact are raised by the pleadings. The order cannot then be held to have been made under that provision.

In the same case it is said, p. 150: "Where there is a consent, his power is still confined, that is, he has no jurisdiction to order the action to be determined, but he may order any question or issue of fact to be tried."

The order herein is not that the questions be referred to be tried, which is the language of sec. 48, but "for enquiry and report," which is the language of sec. 47.

Section 47 gives power to refer "any question arising in any cause or matter \* \* for inquiry or report," and if any, then I suppose all such questions may be so referred.

The order is in similar terms, and I think must be held to have been made under section 47.

*Longman v. East*, 3 C. P. D. 142, further decides, p. 149, that: "Clearly, under sec. 56, (sec. 47 O. J. A.), an action cannot be referred to him to decide facts and law," and page 154, not even "by consent of the parties." It follows therefore that the report must be findings of fact, and of all questions referred. If all the questions arising on the pleadings are referred as on this order, then the report must be the findings of fact as to all such questions; and this is manifestly so, as according to the section, "the report of such referee may be adopted wholly or partially by the Court, and may, if so adopted, be enforced as a judgment by the Court." It is apparent that no judgment could be rendered if any of the questions remain undecided, nor would the Court be in a position to apply the law to a partial finding

The present case affords a very good illustration of the

rule, for on the return of the motion, Mr Shepley stated that he desired to urge :—

1. That at the time of the bringing of the action there was no completion of the contract ; that the plaintiff was then bound to complete the work, the defendant not at that time having taken it off his hands, and that as a matter of law the plaintiff was not, and is not, entitled to recover.

2. That consequently, even if on the other findings the plaintiff is entitled to recover, he is not entitled to recover the “drawback,” and the amount found by the referee as due to the plaintiff must be lessened by that sum.

Upon looking at the pleadings I find they probably raise these questions, but when I look at the report I find it contains two findings as follows :—

“1. The defendant was at the commencement of this action, and still is indebted to the plaintiff for the work and material referred to in the pleadings, in the sum of \$256.53, being the balance which I find upon the taking of the account between the parties to be payable forthwith.”

“2. The plaintiff is entitled to a lien on the premises in the pleadings mentioned, for said sum, together with the costs of the action and the reference before me.”

This latter finding is rather a finding of law than of fact, and is, I take it, to be disposed of when judgment is moved for.

The first finding is objectionable under *Burrard v. Calisher*, 45 L. T. N. S., 793, (See *Lefroy and Cassels Notes of Pr. Cases*, pp. 26, 27, for further references for same, and other cases,) where the reference was held not to be a final one, but a reference for enquiry and report for the assistance of the Court, and the report was remitted to the referee that he might set forth the items of the account taken, and not merely certify the result. Of course the parties may consent to the referee merely reporting such result, and therefore unless moved against on such ground, such objection should not I think be allowed to prevail in answer to a motion for judgment. It was taken in that case



on a motion by the defendant to remit. See the same case, 46 L. T. N. S. 341, where Chitty, J., lays down the practice adopted by his Court.

The head note is as follows; "Where an action which has been referred to the official referee comes on upon further consideration, and one of the parties desires to vary the referee's report, the opposite party should be served with a notice of motion to vary, to be made on the usual motion day, when the motion will be adjourned to come on with the further consideration."

"Where further consideration has not been adjourned, the requisite notice may be by either motion or summons."

As to the meaning of "further consideration," see Rule 321 O. J. A.

In that case his lordship directed that the further consideration of the action should stand over to the following Monday (the usual day for hearing further considerations,) to come on with a motion to vary the report, the notice of motion to be given for the preceding Friday (the usual motion day,) but the motion to stand adjourned as a matter of course, to come on with the further consideration.

If the report supplied me with sufficient material upon which to make an order for judgment, and the defendant were here seeking merely to vary the report, it would probably be necessary to enlarge the motion to enable him to serve notice, but if to this motion no cause had been shown, I do not see how I could have directed judgment, unless I permitted the referee to do what the statute has, as I read it, required me to do, *i. e.*, apply the law to the facts, and direct judgment accordingly. Upon looking at the pleadings, I find questions raised as to the contract—whether performed; if so, time of completion; whether completed in time to entitle plaintiff to his lien; a counter claim for damages for non-completion of contract, &c. I have no findings as to these questions except as involved in the result stated in finding No. 1.

The report must be referred back to have all the findings specially reported, including the items of account,

shewing allowances and disallowances, unless the parties agree to dispense with such detailed statement of account. The pleadings clearly show each question of fact raised. All such questions must be inquired into and reported upon. The motion for judgment must be dismissed.

When the report is thus made the defendant, if he desire to object to any of the findings, must move against them. Such motion can come on at the same time with a motion for judgment.

It was admitted that the defendant had unsuccessfully urged his objections as to the form of the report before the referee, but being pressed by the plaintiff, the referee yielded to his argument, and accordingly the report was made in its present form.

The plaintiff must not therefore have any costs of this motion, or of the general costs of the reference, so far as they are increased by the report being in its present form.

I reserve the question as to the defendant's costs of this motion and increased cost of reference, until after such report is made.

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## RICHARDSON V. JENKIN.

*Costs—Scale of—Title to land—Pleading—Admission—Set-off.*

In an action in the Common Pleas Division, for trespass to lands and removal of fixtures, the plaintiff recovered a verdict for \$50.

The taxing officer taxed Division Court costs to the plaintiff, and full costs to the defendant.

The pleadings admitted an entry under an agreement as to placing fixtures, and their removal and appropriation, but put in issue their wrongful removal.

*Held*, that the taxing officer was right, the title to corporeal hereditaments not being in question.

*Held*, also, that though the defendant had failed to prove his defence, he was entitled to set-off his costs.

When a pleading contains an answer to allegations in the opposite pleading, which is insensible if not read as admitting certain statements, those statements must be taken as admitted.

[July 11, 1884—*The Divisional Court*, C. P. D.]

THIS was an appeal from the order of Galt, J., sitting in Chambers, dismissing an appeal from the ruling of Mr. Clark, one of the Taxing Officers.

The action was for trespass to land and removal of fixtures and was tried before Osler, J., and a jury, at the Fall Sittings of the Court at Walkerton. The plaintiff recovered a verdict for \$50. The learned Judge did not certify to entitle the plaintiff to full costs, thus leaving him to his strict legal rights. The Master taxed to the plaintiff costs according to Division Court scale and to the defendant full costs, entitling the defendant to a set off.

The plaintiff appealed to Galt, J., with above result.

*Bell*, for the plaintiff.

*Aylesworth*, contra.

ROSE, J.—The grounds of appeal assigned before us may be stated thus:

1. That the plaintiff was entitled to full costs, as the title to corporeal hereditaments was brought in question.

2. That the defendant having failed to prove his defence was not entitled to costs of and subsequent to his statement of defence.

The determination of the first question involves a careful consideration of the pleadings, to find as to what *material* statements of fact in the statement of claim the defendant has kept silence in his statement of defence so as under rule 148 to [prevent the plaintiff relying on any admission.

The statement of claim sets out the fact of a tenancy under a verbal agreement for a four years' lease of the premises, from which certain tenants' fixtures are alleged to have been removed by the defendant, who also is alleged to have left before the expiration of his term: that the fixtures removed were in part placed on the premises by the defendant under an agreement with the plaintiff by which the plaintiff remitted three months rent to the defendant. And the plaintiff alleged conversion of the fixtures, "to the damage of the said premises and of the plaintiff of \$250."

The statement may be put thus: the defendant entered into possession of the plaintiff's premises under an agreement for a lease, and removed before the expiration of his term, wrongfully removing and taking away and converting to his own use certain fixtures, thereby causing injury to the premises and loss to the plaintiff.

The defendant states in defence, "that it was agreed between him and the plaintiff that in order to make the said premises fit for the purpose for which the defendant required the same, viz., a shop, it was necessary that a certain old counter and other appurtenances then in and upon said premises should be torn down and removed, and that the defendant should fit up said premises so as to render the place available for the purpose for which he required the same, and that in the event of the defendant at any time removing from said premises he should be at liberty and entitled to remove what improvements he should make and fittings he should place in said premises; and the defendant avers that he removed said old counter and appurtenances and made large improvements on said premises in consequence of said agreement, which improve-

ments the defendant, as he was entitled to, removed when he removed from the said premises."

This statement admits the entry under an agreement as to placing fixtures and the removal and appropriation for his own use, but puts in issue the statement that they were wrongfully removed, alleging an agreement under which he was entitled to remove them. Bearing in mind that where fixtures are severed they become chattels, and that a landlord may maintain trover for them even during the term: see *Farrant v. Thompson*, 5 B. & A. 826; *Hitchman v. Walton*, 4 M. & W. 409; and that trespass to land does not necessarily involve the title to land, it is difficult to see how on these pleadings the title to any corporeal hereditament is brought in question.

If the statement of claim and defence had run thus: "You removed certain fixtures from my house? Answer, Yes I did, but I put them in the house under an agreement with you that I could remove them"—could it possibly be said the title to a corporeal hereditament came in question? Or suppose in addition to the complaint the plaintiff had said; in removing them you damaged or injured the premises, and caused me to sustain loss, would it be any less clear that the title did not come in question?

By such a defence the defendant has not in his pleading kept silence as to the plaintiff's allegation, but has in my opinion admitted all material statements except the terms of the agreement under which he claimed the right to remove.

Rule 148 does not say every material allegation shall be taken as expressly denied, unless expressly admitted by the pleading of the opposite party, but that the silence as to any allegation which, read with rule 128, I take to mean every material allegation, shall not be construed into an implied admission. When therefore, silence is not maintained but an answer given which is insensible if it is not to be read as admitting certain statements in the former pleading, I am of opinion that such statements must be taken as admitted.



I will be glad if rule 148 is repealed, and the rule formerly in force at Common Law again introduced. If such had been the law this motion would not have been invited.

I regret that the plaintiff has been led by the language of the rule into making the appeal. His counsel certainly urged his case ably and earnestly. I think the interests of suitors will be best conserved by the interpretation I put upon the rule.

The second ground of appeal is one that might have been urged before the Judge at the trial but not, I think, on appeal. If it were to prevail as of right the rule as to set off of costs would in every case practically fail of application, as in every case the defendant must fail if the plaintiff succeeds, and it is only in case of the plaintiff's success the rule arises.

In my opinion the appeal fails and must be dismissed, with costs.

CAMERON, C. J., and GALT, J., concurred.

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### DURNIN V. McLEAN.

*County Court—Liquidated amount by act of parties—Costs.*

An action in the Common Pleas Division for \$288.20, the balance of a claim of \$1,828.20 for 8,310 lbs. of butter at 22c. per pound. \$1,600 had been paid on account of the claim.

The plaintiff obtained a verdict for \$228.20. No certificate for costs was asked for at the trial.

*Held*, on a motion to a Judge for an order directing the defendant to pay to the plaintiff full costs without deduction or set-off, that the amount was liquidated by the act of the parties, within the meaning of R. S. O. ch. 43, sec. 19, sub-sec. 2, and the plaintiff without a Judge's certificate was entitled to County Court costs only.

[July 12, 1884.—*Rose, J.*]

THIS was a motion for an order directing the defendant to pay the plaintiff full costs of this action without deduction or set-off.

The facts appear in the judgment.

*B. B. Osler*, Q. C., for the motion.

*Aylesworth*, contra.

ROSE, J.—The action was tried before Osler, J. A., and a jury, and a verdict given for the plaintiff for \$228.50.

No certificate or order for cos'ts was asked for at the trial.

The plaintiff was therefore left to his strict rights. The question is, whether the action was one which could have been brought in the County Court.

To obtain a decision, as to this question, the present motion is made.

The action was brought to recover the amount or balance of a claim for \$1,828.20, being for 8,310 lbs. butter, at 22c. per pound, less \$1,600 paid on account.

If the amount claimed is liquidated or ascertained by the act of the parties, or the signature of the defendant, within the meaning of the 2nd sub-sec. of sec. 19, cap. 43, R. S. O., the Act respecting County Courts, then the plaintiff is not entitled to the order.

It is clearly not ascertained by the signature of the defendant, and apart from the decision in *Wallbridge v. Brown*, 18 U. C. R. 158, I should have thought it was not liquidated by the act of the parties. Robinson, C. J., however, in that case decided that liquidation by the act of the parties meant by their express agreement, and he applied that principle to the facts in that case, at p. 169, as follows :

“The defendant was bound to pay, first the invoice price of the person who had furnished the article to the plaintiff, and what that was would appear on production of the invoice. Then the defendant was to pay the freight, duties, &c., which could in like manner be made certain as to amount by showing what the plaintiff had paid for freight and duties. The “&c.” added in writing, signifies nothing, and creates no difficulty, for the Court would have to determine whether anything could be admitted under them

or not. If a claim had been made under those words, and rejected or allowed, it would still have been a claim that must have been liquidated, for it could only have been the precise amount which the plaintiff had paid."

In that case the agreement was evidenced by a receipt in writing in the following words: "Received from W. A. Wallbridge one iron lathe, pulleys, &c., for which I am to pay him the invoice price (to Jordan & Earle) and the charges of freight, duties, &c., and am to be allowed thirty dollars deduction from the whole amount. I am to give my note for these articles, as well as others I may buy from said Wallbridge, at six months from this date, payable at some bank in Belleville, with interest."

On the trial the plaintiff called a witness to prove the invoice price of the lathe, and the amount of charges and duties.

An objection then taken by the defendant as to the jurisdiction was overruled.

There was in that case an item of £7 10s., concerning which the learned Chief Justice said as follows: "In the present case the plaintiff, by his endorsement on his summons, claimed a balance of £7 10s. due him on money lent, in addition to what he claimed upon the contract for the sale of the iron lathe. That small item of £7 10s., with the interest upon it, was a cause of action liquidated by the nature of the transaction, or, as the present statute expresses it, 'by the act of the parties.'"

So strongly did his lordship feel that he gave judgment in the following words: "We see no pretense for a prohibition."

The result of that decision, as I understand it, is, that if parties agree, as in this case before me, to the price of the article to be purchased the amount is liquidated by the act of the parties.

Following that decision, as I think I must, sitting here, I cannot distinguish it from the case before me, where the plaintiff sold and the defendant purchased a certain number of pounds of butter at a named price. I at one time

thought I might distinguish on the ground that in *Wallbridge v. Brown* the whole claim was within \$400, the jurisdiction of the County Court as to ascertained amounts, but upon reflection I see no distinction in principle. The result would be that a note for over \$400 reduced by part payment to an amount over \$200 could not be sued in the County Court. This I think would not be a correct result.

In the Act extending the jurisdiction of Division Courts, 43 Vic. (O.) ch. 8, sec. 2, the words used are : "The amount or the original amount of the claim is ascertained." These words were probably introduced to save any such question arising.

If, as in *Wallbridge v. Brown*, 18 U. C. R., 158, the amount of freight and duties, unknown and unascertained amounts, becomes liquidated so soon as they are paid, so that on an agreement by A. to pay whatever sum B. might be called upon to pay in the purchase of butter, the amount to be paid by A. becomes liquidated so soon as paid by B., then *a fortiori* if A. agrees to pay B. so much a pound for a quantity of butter then in hand the amount is liquidated by the agreement. I have difficulty in going that length, but any doubt I may have is of minor consequence opposed to the positive opinion of the eminent jurist who decided that case.

The result is, that I must hold that the amount was liquidated by the act of the parties at \$1,828.20, and being reduced by payment to \$1,600, leaves a balance of \$228.20, which is a claim liquidated by the act of the parties, and within the jurisdiction of the County Court.

I cannot interfere in the plaintiff's favour on any ground of discretion (even if I have the power) as on conference with the learned Judge before whom the case was tried, I find that he would have exercised his discretion to refuse any certificate or order that would relieve the plaintiff from the result of his bringing his action in the Superior Court, if, as I am compelled to hold, he might have brought it in the County Court.

The motion must be refused, with costs.

## RINGROSE V. RINGROSE.

*Costs—Alimony action—R. S. O. ch. 40, sec. 48.*

Pending an action for alimony and before trial, the plaintiff returned to live with the defendant.

*Held*, that the defendant should pay only the cash disbursements of the plaintiff's solicitors.

*Keith v. Keith*, 25 Gr. 110, considered.

[September 23, 1884.—*Proudfoot*, J.]

*Elgin Myers*, for the defendant in an alimony suit, appealed from the order in Chambers of the local Judge at Orangeville, ordering the defendant in this action, which was for alimony, to pay the full costs of the plaintiff's solicitors, the plaintiff having returned to live with the defendant pending the action and before trial. He argued that the order should be confined to the cash disbursements of the plaintiff's solicitors, relying upon R. S. O. ch. 40, sec 48.

*W. H. P. Clement*, for the plaintiff's solicitors, contra, cited *Leonard v. Leonard*, 9 P. R. 450, and *Moore v. Moore* 10 P. R. 284.

PROUDFOOT, J.—The provision of R. S. O. ch. 40, sec 48, is, that "In no suit for alimony, in which the plaintiff fails to obtain a decree for alimony, shall any costs be decreed to be paid by the defendant beyond the amount of the cash disbursements properly made by the plaintiff's solicitor." The right to costs in the present case depends wholly upon the provisions of this statute. The English authorities cited in *Leonard v. Leonard* have no application to the present case, as they have no statutory provision in England equivalent to the provisions of our Revised Statutes.

The whole question was fully discussed in *Keith v. Keith*, 25 Gr. 110, before this Court on rehearing. In that case I had at the hearing made a decree for full costs as against the defendant, acting upon the opinion that the



consent there given by the husband to receive back and support the wife was equivalent to a decree for alimony within the meaning of that term, as used in the statute. That decree was affirmed upon rehearing, upon the ground that the defendant had accepted and acted upon the decree, and was therefore precluded from appealing against it. The late Chancellor dissented from that judgment upon the ground that a reconciliation and return of the wife to the husband is not equivalent to a decree for alimony within the meaning of that term, as used in the statute, and upon this question of the construction of the statute I agree with him, and think that I erred in holding as I did at the hearing in *Keith v. Keith*, that such a reconciliation is equivalent to a decree for alimony.

The order should be varied by providing for payment only of the cash disbursements properly made by the plaintiff's solicitors.

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## HUGHES V. REES.

*Estoppel—Pleading—Jurisdiction of Master—Indemnity to trustee under a void trust deed—Husband and wife—Agency—Maintenance of children.*

Where a party does not plead a prior judgment in bar by way of estoppel before the entry of a judgment directing a reference to the Master in Ordinary, he waives it, and leaves the whole matter at large to be enquired into on the evidence.

The Master has no jurisdiction to make amendments to the pleadings after judgment; nor could he give leave to file a statement in his office raising a defence which ought to appear in the pleadings.

It is incident to the office of a trustee that the trust property shall reimburse him for his expenses in administering the trust; and a clause so indemnifying a trustee is infused into every trust deed; and the statute R. S. O. ch. 107, sec. 3, does little more than what Courts of equity had been accustomed to do without any statutory direction.

Therefore a trustee who had been induced by a settlor to accept a trust under an instrument void by the law of the settlor's domicile, is entitled to be reimbursed by such settlor for all his expenses incurred in the execution of the trust.

The defendant's wife, who had been supported by the plaintiff with the defendant's consent, returned to her husband's home, but was turned out of the house by him, whereupon the plaintiff again took charge of and supported her.

*Held*, that the defendant, by turning his wife out of his house, sent her forth as his delegated agent to pledge his credit for the necessaries of life suitable to her position, and that the plaintiff was therefore entitled to assert a claim against the defendant for his expenses in so supporting the defendant's wife. And such claim can be maintained up to the date of a judgment allowing alimony to the defendant's wife.

Where a father whose children are maintained by another, and who could have obtained possession of their persons by *habeas corpus*, allows them to be so maintained, he is liable for their support and maintenance, to the person in whose care such children are.

[June 7, 1884.—*The Master in Ordinary.*]

In this case a reference was made to the Master in Ordinary in the terms of the judgment reported in 5 O. R. 654. The material facts are stated there, and in the judgment here reported.

*S. H. Blake, Q. C., and George Morphy, for plaintiff.*

*MacLennan, Q. C., and R. E. Kingsford, for defendant.*

MR. HODGINS, Q. C.—The judgment directs an enquiry whether the plaintiff has any valid claim against the defendant for the maintenance and support of the defendant's wife and children, and also whether the plaintiff has

been put to any other expenses or charges in respect of the supposed trust deed which by the judgment has been declared invalid.

Against the claim made by the plaintiff the defendant contends : 1st. That the question of the personal liability of the defendant to the plaintiff for the support of the defendant's wife is *res judicata*, by virtue of a judgment against the plaintiff in an action for the same matter brought by the plaintiff against the defendant in the Superior Court of Quebec: *Hughes v. Rees*, 5 Quebec Legal News 70. 2nd. That the trust deed being void, the plaintiff is not entitled to any claim for his expenses thereunder.

As to the first point, the rule of law has been thus stated: The judgment of a Court of competent jurisdiction directly on the point is, *as a plea*, a bar; and *as evidence* is conclusive between the same parties upon the same matter directly in question in another Court. A reference to the cases will show whether the two things, pleadings and evidence, are as inseparable of consideration as that the subject matter and the parties must be the same,

A judgment at law is classed as an estoppel by record, and in each species of action such judgment is final in its nature and according to its class and degree in the order of actions, and for its own proper purpose and object, and upon its own subject matter, and no further.

The distinction as to the effect of an estoppel when pleaded, and when given in evidence, was early asserted. In *Trevivan v. Lawrance*, 1 Salk. 276, it was said "Not only that the parties and all claiming under them, but the Court and jury were bound by this estoppel, and that the jury cannot find against this estoppel. And the Court took this difference, that where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel; for here is a title in the plaintiff, that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but if the defendant pleads the special matter, and the plaintiff will

not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel."

And in *Outram v. Morewood*, 3 East 346, Lord Ellenborough, C. J., says, at p. 365: "Lord Mansfield held, very properly, that the plaintiff had not obtained such a determination of his right by the former verdict as the law considered as conclusive. It could only be conclusive upon the right, if it could have been used and were actually used in pleading by way of estoppel, which it could not be in that case: First. Because no issue was taken in the first action upon any precise point, which is necessary to constitute an estoppel thereupon in the second action. Secondly, it was not even *pleaded* by way of estoppel in the second action, but only offered as *evidence* on the *general issue*: and in order to be an estoppel it must have been, as already observed, pleaded as such by apt averments."

So in *Vooght v. Winch*, 2 B. & A. 662, Abbott, C. J., said, at p. 668: "I am of opinion that the verdict and judgment obtained for the defendant in the former action was not conclusive evidence against the plaintiff upon the plea of not guilty. It would indeed have been conclusive if pleaded in bar to the action by way of estoppel." And further: "It appears to me, however, that a party, by not pleading the former judgment in bar, consents that the whole matter shall go to a jury, and leaves it open to them to inquire into the same upon evidence, and they are to give their verdict upon the whole evidence then submitted to them."

In *Wood v. Jackson*, 8 Wend. 11, the learned Judge in commenting on the above case says, at p. 41: "The distinction is a sound one and the reasoning is satisfactory, because the general rule, '*nemo debet bis vexari*,' is still preserved; the party to be affected may insist upon its protection by pleading, or he may waive it by leaving the matter at large upon the pleadings. If he will waive it when he might insist upon it, he cannot afterwards assert it."

These observations are applicable to this case. The plaintiff had an opportunity of pleading the judgment of the Quebec Court, when, on the 7th March, 1883, the plain-



tiff obtained leave to amend his bill of complaint generally on or before the 10th September, but he did not apply for such leave, nor did he plead, as I think he might have pleaded without leave, the estoppel of this Quebec judgment.

During the argument an application was made to me for leave to plead the estoppel, or to file a statement raising it in the Master's office, but I know of no authority for such amendments after judgment; and the Court has not given to the Master the jurisdiction usually vested in an arbitrator "to make all necessary amendments to the pleadings as a Judge at *nisi prius*." And as to filing a statement in the Master's office, I think I would be introducing a novel evasion of an established practice; for the cases above referred to show that to be effectual such a defence should appear on the pleadings, and not in the papers filed after judgment.

I must therefore hold that the defendant cannot now rely upon the judgment of the Quebec Court as an estoppel against the plaintiff's claim; and that the case is open to be enquired into on the whole evidence.

The second ground of defence also fails. *Smith v. Dresser*, L. R. 1 Eq. 651, is no authority for the defendant's contention; for in that case the learned Judge pointed out that the trustees were, or ought to have been, aware that the trusts of the deed were all invalid before they began to act upon them. In this case it is the other way. The defendant is a resident of Quebec, while the plaintiff is a resident of Ontario. The defendant must be presumed to know the law of his domicile, and, by that law, this trust deed is void. Yet, having that presumptive knowledge, he induced the plaintiff to act as one of the trustees under this void trust deed. And now, after it appears that the plaintiff has paid moneys for the support of his, the defendant's, wife, on the faith of the trust deed, this defendant invokes the law of his domicile and succeeds in setting aside the deed. Then he comes before me and asks that all payments so made by the plaintiff be disallowed.



It might be sufficient in this case to invoke the law as to representations: that where a party by his representation induces another to make advances or alter his position he shall make good his representation, and indemnify such other party for his advances: *Freeman v. Cooke*, 2 Ex. 654. But the rule of all Courts of Equity affecting such trusts as the present is, that where parties place others in the position of trustees for them they are in equity personally bound to indemnify them against the consequences resulting from that position: *Ex parte Chippendale*, 4 DeG. M. & G. at p. 54.

"It is," says Lord Eldon, "in the nature of the office of a trustee, whether expressed in the instrument or not, that the trust property shall reimburse him all his charges and expenses incurred in the execution of the trust:" *Worrall v. Harford*, 8 Ves. at p. 8. And the Court infuses such a clause into every trust deed: *Dawson v. Clarke*, 18 Ves. at p. 254. The statute therefore only does what a Court of Equity would have done without any directions: R. S. O. c. 107 s. 2.

This indemnity may be enforced even when the trust deed is void, unless the expenditures are made with the knowledge of the invalidity of the trust deed, as in *Smith v. Dresser*, L. R. 1 Eq. 651. Thus a trustee acting *bonâ fide*, and with the concurrence of the heir-at-law, under a will which was supposed to be valid as to real estate, but which afterwards turns out to be invalid, is entitled to be indemnified out of the estate: *Edgecumbe v. Carpenter*, 1 Beav. 171.

And where trustees under a void deed had acted *bonâ fide*, they were allowed the moneys they had paid, and the value of materials they had supplied in accordance with the terms of the trust deed: *Wood v. Axton*, 1 W. Notes 207.

Similarly, where trustees had acted under a void settlement, they were allowed their costs against the settlor, who has occasioned them by his own voluntary act: *Daking v. Whimper*, 26 Beav. 568. And when the Court finds a trust deed or a will and a fund, it avails itself of the fund

to relieve the difficulties created by the instrument: *Mohun v. Mohun*, 1 Swans. 201.

See also *Morison v. Morison*, 2 Sm. & Giff. 564, 7 Deg. M. & J. 215, 1 Jur. N. S. 339, 1100; *Attorney-General v. Norwich*, 2 M. & C. 406, 1 Keen 700, 1 Jur. 398; *Nelson v. Duncombe*, 9 Beav, 211, 10 Jur. 399.

There is a conflict of evidence as to what took place between the defendant and the plaintiff's agent respecting the removal of the defendant's wife from the Longue Point Asylum in March, 1877. But the defendant impressed me unfavourably while giving his evidence. He betrayed a very strong bias, and appeared to give his evidence in a reckless manner. One witness was called to sustain him, but his evidence, if material, only proves that after the removal of the defendant's wife from the asylum the defendant stated he would not be liable for her maintenance. Yet on the day after this the defendant gives to the plaintiff's agent two cheques for \$150 and \$144.50 towards the payment of his wife's expenses, without limiting by word or writing his further liability. And when subsequently replying to the plaintiff's letter respecting the proposed pilgrimage and his wife's health, he never refers to the alleged removal of his wife from the asylum without his consent, or against his wishes, nor intimates to the plaintiff any alleged repudiation or liability for the future support of his wife. His letter of reply refers to his non-liability on a promissory note; but at the end of it he apparently consents to his wife and her relations deciding upon her movements in these words: "When Father Dowd called as to the pilgrimage, I wrote that he had better consult with Annie's relations; and I can only say that they and she must decide as to her going or not."

The defendant's evidence is inconsistent with his acts and writings at the time of her removal; and although he may have opposed his wife's return to his own house, I find on the evidence that he did not oppose, but in fact assented, to her removal from the asylum, and to her going to Toronto; and that he admitted a liability to the plaintiff for her support by paying to him, in advance,

the two sums already referred to. This conclusion is further borne out by the subsequent conduct of the defendant when his wife was brought to his home in October, 1878. Whatever may have been his intention respecting his wife's support prior to that time, his conduct then clearly establishes his liability. He then had the opportunity if she was, as he now contends, suffering from *mania*, of taking that charge and care of her which from his relationship, his duty to her, and to the law, he was bound to do, and, if lawful for him to do so, of placing her again in the asylum. But his own statement on oath proves that he refused to take any charge of her, and actually turned her out of his house. By this wrongful act he sent her from his home as his delegated agent to pledge his credit for the necessaries of life suited to her condition: *Eastland v. Burchell*, 3 Q. B. D. 432.

The plaintiff was present when the defendant wrongfully turned his wife out of his house, as described in the evidence, and again took charge of and supported her; and for such maintenance and support the law gives him a valid claim against the defendant.

The plaintiff also claims to be allowed for the support of the defendant's children subsequently to the 10th February, 1879. The reasons which induced these children to leave the defendant's house and go to the plaintiff, are set out in the letter of the defendant's daughter which was put in evidence at the request of the defendant's solicitor. That letter and the frequent references in the evidence to the home life of the defendant, which he never referred to or denied, warranted the children in seeking a purer home. As their father, he could, if the *inuendo* was untrue, have obtained possession of their persons by *habeas corpus*. But he did not do so, and therefore he must be held to have consented to be liable for such sums as were reasonable to be expended for their clothing and maintenance: *Griffith v. Paterson*, 20 Gr. 615.

The plaintiff's claim will be allowed up to the date of the allowance for alimony made by the Quebec Superior Court

## FRIEDRICH V. FRIEDRICH.

*Solicitor—Settlement of action by parties—Fraud on solicitor—Solicitor's rights and remedy.*

A settlement of an alimony action after judgment for permanent alimony, upon which writs of execution were in the sheriff's hands, was effected between the parties without the intervention of the solicitors on the record. To carry out the settlement a third solicitor was instructed to withdraw the writs from the sheriff's hands, which he did without paying the costs of the plaintiff's solicitor, which he knew were unpaid. There was no collusion or actual fraud against the plaintiff's solicitor proved.

*Held*, that the plaintiff's solicitor had control of the writs in the sheriff's hands to the extent of his unpaid taxable costs, and that he was entitled to have the writs replaced, or new writs placed in the sheriff's hands at the expense of the solicitor who withdrew them and the plaintiff, or to an order directly against the defendant for payment of his unpaid taxable costs, and for the costs of the motion against the plaintiff and the solicitor who withdrew the writs; but that he was not entitled to an order for payment of his unpaid costs by the solicitor or the sheriff.

[August 12, 1884.—*Ferguson, J.*]

IN this action orders had been obtained for interim alimony against the defendant, and judgment recovered for permanent alimony with costs of action, whereupon writs of execution were placed in the sheriff's hands against the goods and lands of the defendant. The lands of the defendant were standing in the name of a trustee for him at the time the writs were delivered to the sheriff, and so remained. The plaintiff and defendant, in the month of June, 1884, effected a settlement of their differences without consulting their solicitors, and thenceforward lived or agreed to live together, and to effectuate the settlement the plaintiff wrote a letter to Mr. Mahon, a solicitor, instructing him to withdraw the writs from the sheriff's hands, as the action had been settled. Both Mr. Mahon and the sheriff were aware that the plaintiff's solicitor had not been paid his costs. Mr. Mahon made an offer of a sum in full of costs to the plaintiff's solicitor, which he refused to accept. He then withdrew the writs from the sheriff's hands. The plaintiff's solicitor then made this application against Mr. Mahon, the defendant, and the sheriff, for an order for payment by some or one of them of his costs



taxable against the defendant, and unpaid, or that the writs might be replaced to the sheriff's hands, or that new writs similarly endorsed might be issued at their expense and placed in the sheriff's hands, and for the costs of the motion.

*E. Douglas Armour*, for the plaintiff's solicitor. The settlement was in fraud of the solicitor's rights, for he controls the writs while his costs are unpaid, and has a property in the writs to the extent of his unpaid costs: *Ex parte W Games*, 3 H. & C. 294.

[FERGUSON, J.—The costs are given to indemnify the plaintiff. Do they not belong to her?]

*Armour*—The plaintiff is not entitled to indemnity until she has paid her solicitor. Before payment the solicitor has a lien. The plaintiff cannot discharge that lien. It is not necessary to show collusion against the solicitor or an actual attempt to defraud him. If the result is to deprive him of his costs or the means of obtaining them, that is sufficient: *Morgan v. Holland*, 7 P. R. 74; *Hall v. Griffith*, 4 C. L. T. 192. The defendant in an alimony action is always under a certain direct liability to the plaintiff's solicitor, whose right cannot be taken away by a settlement with the plaintiff personally. See *Leonard v. Leonard*, 9 P. R. 450; *Moore v. Moore*, 10 P. R. 284; and *McPhatter v. Blue*, 15 C. L. J. N. S. 162, is an authority for the liability of the solicitor who aided the settlement in derogation of the applicant's rights.

*Creelman*, for the defendant. A settlement of an alimony suit is not one from which collusion can be inferred, as in other cases. There must be collusion: *Welsh v. Hole*, 1 Doug. 238; *Francis v. Webb*, 7 C. B. 731; *Jones v. Bonner*, 2 Ex. 230. The relief asked is purely in the discretion of the Judge: *Brownscomb v. Tully, Re Fairbairn*, 3 Chy. Cham. 71. The money represents the work of the plaintiff's solicitor. There were no fruits or benefits recovered in this action. There has been no money fund or property recovered from the defendant.



*O'Sullivan*, for Mr. Mahon and the sheriff. There cannot have been collusion, for the plaintiff has got nothing by the settlement, and collusion is necessary to entitle the applicant to succeed: *In re Sullivan v. Pearson*, L. R. 4 Q. B. 153; *Gross v. Cross*, 43 L. T. N. S. 533.

FERGUSON, J.—At the argument it was stated that no reliance was placed by the applicant (the plaintiff's solicitor) upon an agreement between him and the plaintiff respecting the interim alimony and other matters. The original agreement could not be found, and no copy was used or put in. It was admitted that no fraud or collusion was shown (directly by the evidence) in respect of the settlement made between the plaintiff and the defendant. The case then is simply this, an alimony suit had been brought and there were writs of execution against the defendant for interim alimony and costs of the plaintiff in the hands of the sheriff to be executed. The plaintiff and defendant then met and agreed to settle their difference and live and co-habit together again, and the plaintiff gave instructions to another solicitor to have these writs of execution withdrawn, which was done, and this application is then made by the plaintiff's solicitor on the record for the relief that he asks, viz., to have the writs replaced in the hands of the sheriff, or other writs similarly endorsed placed in his hands, or an order against the defendant or sheriff, or the solicitor who withdrew the writs, for the payment of the plaintiff's costs to her solicitor and costs of this motion.

The settlement of a suit of this character, in the way stated, by an agreement between the parties to co-habit together again, is one that is favoured by the Court as being in accordance with public policy, and is not a fact from which I think collusion could be inferred without proof. The plaintiff got nothing by the settlement. Counsel for the applicant contended that he should succeed even in the absence of fraud or collusion. The property against which it was said that the writs of execution could

he made available was certain land said to have been in the hands of a trustee for the defendant. It was admitted that another suit would be necessary for the purpose of realizing out of these lands, and that the execution did not directly attach upon the alleged equitable interest of the defendant. The applicant had been paid by the plaintiff between \$300 and \$400, but it was alleged that \$200 of this sum was on an account other than the costs of this action.

The subject is one of some nicety, as appears by the views of many of the learned Judges. The older authorities seem to indicate that the absence of collusion should be fatal here. The later cases, however, do not appear to support such a contention. Here the plaintiff recovered a judgment by and through the exertions of the applicant, her solicitor. It was said that the writs of execution were not issued upon this judgment for permanent alimony, but upon orders for the payment of interim alimony and costs. Such orders have, however, the effect of judgments. The applicant had, I think, a lien upon them and the judgment for permanent alimony to the extent of his unpaid costs of the action, and he had as a consequence, I think, the right of control to the same extent of the writs in the sheriff's hands. The withdrawal of the writs without any reference to him or his claim, was, I think, an act in violation of his rights whether there was or was not collusion in fact, and I am of the opinion that the applicant is entitled to an order against the plaintiff and her solicitor, who, under her instructions withdrew the writs, for the delivery of the writs to him (the applicant) to be replaced in the hands of the sheriff for execution, or if the writs have been lost or destroyed, then for the issue by the applicant of duplicate writs to be endorsed as were the original writs, and delivered to the sheriff to be executed, and in such case an order upon the plaintiff and the solicitor who withdrew the writs to pay him the costs of such duplicate writs. The applicant is, according to some of the cases, entitled to an order against the defendant to pay him the

amount of his unpaid costs. This order he may have if he desires it, but I suppose the judgment, executions and lien will be considered preferable.

I do not see my way to making the order asked for the payment by the solicitor who withdrew the writs, or the sheriff, of the unpaid costs of the applicant. It is not, I think, necessary to decide now anything respecting their liability or that of either of them, or whether or not there is any such liability in respect of the act done and complained of in the nature of damages. What was done against the right of the applicant was the withdrawal of the writs. It rather appears from what passed on the argument that to realize out of the equitable interest aforesaid, was the sole expectation of the applicant in respect of these writs. Confessedly another suit was necessary to do this. In such a suit the applicant might fail, and I cannot say what, if any, value the writs in the hand of the sheriff were to him. The case is, I think, not at all like the cases where a sum of money equal to or greater than the unpaid costs passed through the hands of the solicitor or the sheriff. The order above granted may go, but this relief cannot, I think, under the circumstances be awarded.

As to the costs, I think the applicant entitled to his costs of this application against the plaintiff and the solicitor who withdrew the writs, and I think the same parties should pay the sheriff's costs.

This case was argued in Appeal 12th September, 1884, and judgment reserved.

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## CLARKE V. UNION FIRE INSURANCE COMPANY.

*Insurance—Provincial incorporation—British North America Act—Foreign contract—Lex loci contractus.*

A company incorporated by a Provincial Legislature for the business of insurance, possesses the same capacity and franchises within the jurisdiction creating it as a company incorporated by the Imperial or Dominion Parliaments; and may enter into contracts outside the Province wherever such contracts are recognized by comity or otherwise. The term "Provincial objects" in the British North America Act refers to local objects within a Province, in contradistinction to objects which are common to all Provinces in their collective or Dominion quality.

The legislative enactments of a country have no binding force *proprio vigore* in another country, and a Legislature cannot authorize corporations created by it to carry on business in a foreign country. Where, however, a Legislature assumes so to do, such authority is only a legislative sanction to the agreement of the incorporators to transact their business abroad as well as at home.

The locality of the forum of litigation determines whether a corporation is foreign or not. A contract executed in Ontario, and delivered by the agent of the contractor to the contractee in New York, is governed by the laws of Ontario.

So a contract signed and sealed in blank at a head office of a company in Ontario, and sent to the company's agent in New York to be filled up and delivered to the contractee there, is a contract made in Ontario by relation to the act of signing and sealing such contract at such head office.

Where no place of payment of a policy of insurance is mentioned in the policy it must be assumed that the place of payment is where the head office of the insurance company is situated, and this fact may determine the question of the *lex loci contractus*.

[October 30, 1883.—*The Master in Ordinary.*]

In this case a decree was made at the suit of a creditor, referring it to the Master in Ordinary to wind up the company, and to adjudicate upon the claims of creditors holding policies of the defendant company. Prior to the decree a common law action had been commenced by the claimants, the Export Lumber Company of New York, against the defendants, on their policy, which was referred to the Master pursuant to the decree. The other facts of the case appear in the judgment.

*Falconbridge*, for the Export Lumber Company.

*W. A. Foster*, for the plaintiff.

*A. C. Galt*, for the defendants.



MR. HODGINS, Q. C.—This is a claim brought in by the Export Lumber Company of New York, against the defendants, a fire insurance company incorporated by the Legislature of Ontario, 39 Vic. ch. 93. The policy, dated 5th August, 1880, was delivered to the claimants on the 7th or 8th, and the fire occurred on the 10th of the same month. On the 11th the claimants tendered a cheque for the premium, which was immediately returned by the defendants.

The principal defences are that the defendants being a provincial company had only limited powers, and could not contract out of this Province; and that, the premium not having been paid or tendered until after the loss occurred, the policy is void.

In arguing that the contract was *ultra vires*, it was contended that as the British North America Act (sec. 92 sub-sec. 11) empowered the Provincial Legislatures to incorporate companies with "Provincial objects," this corporation could have no existence, and therefore no power to contract, outside the Province; and in any event that not having obtained legislative sanction authorizing it to make contracts of insurance outside the Province, this contract was void.

The substantial objection is against the legislative powers of the Provincial Legislatures; for it was contended that a corporation created by them has not the status nor capacity to contract outside of provincial jurisdiction which a Dominion corporation possesses. There is no warrant for this contention. There is nothing in the British North America Act, nor in the classes of subjects within their legislative authority, which would place these Legislatures outside the definitions given by writers on this subject: "The colonial Legislatures, with the restrictions necessarily arising from their dependency on Great Britain, were sovereign within the limits of their respective territories:" 1 Story's Const., 4th ed., sec. 171. "The legislative bodies in the dependencies of the Crown, have *submodo* the same powers of legislation as their prototype in England, subject, however, to the final negative of the sovereign:" 1 Broom's Com. 123.



The term "incorporation of companies with Provincial objects" in the British North America Act (sec. 92 sub-sec. 11) defines the classes of corporations within the legislative authority of the Provinces; and its meaning must be gathered from analogous clauses empowering them to make laws in relation to "local works and undertakings" (sub-sec. 10) and "matters of a merely local or private nature in the Province" (sub-sec. 16) and under which it is obvious the Legislature may incorporate companies for like purposes. These references show that the terms "provincial" and "local" are interchangeable, and must be construed to mean "local objects" within a Province, in contradistinction to objects common to the several Provinces in their collective or Dominion quality, and which are within Dominion legislative jurisdiction.

This power to incorporate companies is incidental to a sovereignty, though such power may be delegated. "The sovereign, it is said, may grant to a subject the power of erecting corporations, \* \* \* but it is really the crown that erects, and the subject is but the instrument:" 1 Bl. Com. p. 452. Corporations may be erected by charter or by Act of Parliament "of which the Royal assent is a necessary ingredient." *Ibid.* p. 451.

This assent of the Crown, as essential to the validity of the Acts of the Provincial Legislatures, has been questioned by the *obiter dicta* of some learned Judges, who say that Her Majesty forms no constituent part of the Provincial Legislatures as she does of the Dominion Parliament. This denial of the legislative authority of the Crown in Provincial Legislation touches the validity of all Provincial Acts since Confederation, as the usual form of the Provincial statutes is "Her Majesty, by and with the advice, &c., enacts." "The legislative power (says Lord Hale) is lodged in the King, with the assent of the two Houses of Parliament:" 1 Hale's Juris. Ho. Lds. 4: "The making of statutes is by the king with the assent of Parliament:" 1 Whitelock King's Writ, 406: "The king has the prerogative of giving his assent to such

bills as his subjects, legally convened, present to him, that is of giving them the force and sanction of a law": Bacon's Abr. tit. Prerog. 489. See also 4 Co. Ins. 24.

This is but the common law on the legislative prerogative of the Crown. A reference to the Imperial Acts which gave legislative institutions to this Province prior to the British North America Act, will shew that the Provincial laws of Upper Canada were to be made by "His Majesty, his heirs and successors," (31 Geo. 3 ch. 31), and of Canada by "Her Majesty her heirs or successors," (3 & 4 Vic. ch. 35) by and with the advice and consent of the other legislative bodies; and these Imperial Acts in so far as they recognize the legislative prerogative of the Crown in this Province have not been repealed, but are substantially continued by sec. 129 of the British North America Act.

The question, however, appears to have been determined in 1876 by the Judicial Committee of the Privy Council in *Théberge v. Landry*, L. R. 2 App. Cas. 102—which is binding on all our Courts—where Lord Cairns, L. C., referring to an Act of one of the Provincial Legislatures then under review, held that it was an Act which had been assented to by the Crown, and to which the Crown therefore was a party, (p. 108).

The British North America Act created two separate and independent governments with enumerated and therefore limited parliamentary powers. These dual governments within their defined limits of jurisdiction now exercise the legislative and executive powers previously vested in one government; and although both exist within the same territorial limits, their powers are separate and distinct, and they act separately and independently of each other within their respective spheres. The powers of the legislative department of the Provincial Governments have been defined by our Provincial Courts. The case of *Re Goodhue*, 19 Gr 366, decides that there is no limitation imposed on the Provincial Legislatures as regards the extent to which they may affect private rights and matters of a merely local and private nature in the province; and that as to such objects they

can pass laws to the same unlimited extent that the Imperial Parliament may in the United Kingdom, (p. 452) In *Regina v. Hodge* 7 App. R. 246, it is stated that the Dominion and Provincial Legislatures derive their powers from the same source ; and that “ the power to make laws in relation to the several classes of subjects, legislation upon which is, by the Imperial Act, committed exclusively to the Provincial Legislatures is as large and complete as it is in the classes of subjects committed by enumeration of subjects to the Dominion Parliament. The limits of the *subjects* of jurisdiction are prescribed ; but within those limits the authority to legislate is not limited.” (p. 251.) See also *Hodge v. The Queen*, L. R. 9 App. Cas. 117.

These cases shew that both the Dominion and the Provincial Legislatures have plenary powers of legislation to the extent necessary for the efficient exercise of the exclusive legislative authority of each ; and that they therefore are sovereignties within the definitions given in 1 Story’s Cons sec. 171 ; *Phillips v. Eyre*, L. R. 6 Q. B. at p. 20 ; and *The Queen v. Burah*, L. R. 3 App. Cas. at p. 904. Each has authority to create corporations ; and therefore a company incorporated by a Provincial Legislature has, for the purposes of its business, the same corporate franchises and powers within the jurisdiction creating it, as a company incorporated by the Imperial or the Dominion Parliament, and may transact its business outside the Province wherever by comity or otherwise its contracts are recognized.

This power to transact insurance business outside the provincial jurisdiction creating such corporations is regulated within Canada by the Act 40 Vic. ch. 42 sec. 28, which provides that companies incorporated by a Provincial Legislature for carrying on the business of insurance within a Province, may, under certain conditions, transact such business throughout the Dominion. And the case of *Citizens Insurance Co. v. Parsons*, L. R. 7 App. Cas. at p. 115, illustrates to some extent the jurisdiction of the Provincial Legislatures over companies incorporated by the Imperial or Dominion Parliaments.

As to the contention that these defendants not having obtained permission in their act of incorporation to transact insurance business in foreign countries, it may be answered that no Legislature can confer upon corporations created by it the right to carry on business outside its own territory. The Legislative enactments of a country have no binding force *proprio vigore* in other territorial sovereignties. Wherehowever a Legislature assumes to authorize its corporations to carry on business in foreign countries, such authority is no more than a legislative sanction to an agreement between the corporators that their business may be carried on abroad as well as at home. It has been held in one of the Federal Courts of the United States, that it is not competent for a State Legislature to enact that its citizens shall not make such contracts as they please in respect of their business out of the state: *Lamb v. Bowser*, 7 Biss. Cir. Ct. 315. Where there is no express provision in the charter of a corporation limiting its ordinary business to a particular place or territory, no such limitation can be implied: *Morawetz on Corp.* 502. And there is nothing in our law which would prevent a corporation created here from carrying on business both at home and abroad in the same manner as an individual or a co-partnership engaged in a similar enterprise. The contract here sued upon appears to be within the corporate powers of these defendants; and the cases shew that such a contract would be recognized as valid in a foreign country.

Corporations are defined to be mere artificial bodies invisible and intangible; local inhabitants of the places of their creation. Yet they are "persons" for certain purposes in contemplation of law; and as such are permitted by the comity of nations to make contracts in other states than the one creating them, and which would be valid if made in such state by natural persons not resident therein: *Bard v. Poole*, 12 N. Y. 495. Natural persons through the intervention of agents are continually making contracts in the country in which they do not reside; and there can be no objection to the capacity of an artificial person, by its



agents making a contract, within the scope of its limited powers, in a country in which it does not reside. By the law of comity among nations a corporations created by one sovereignty is permitted to make contracts in another and to sue in its courts. "The public and well known and long continued usages of trade, and general acquiescence of states all concur in proving the truth of this proposition:" *Bank of Augusta v. Earle*, 13 Pet. 519. This comity is recognized in England; and a foreign corporation may carry on trade in London, and be treated as a resident there: *Newby v. Von Oppen and Colt's Patent Firearms Manufacturing Co.*, L. R. 7 Q. B. 293. Similarly a foreign corporation may make contracts and carry on business in Ontario: *Howe Machine Co. v. Walker*, 35 U. C. R. 37. The locality of the forum of litigation determines whether a corporation is "foreign" or not. Thus a company incorporated by the Imperial Parliament for the purpose of building a railway in Scotland is a foreign corporation in England: *Mackereth v. Glasgow, &c., R. W. Co.*, L. R. 8 Ex. 149; although Scotland is not a foreign country to England: *Re Orr Ewing*, 22 Chy. Div. at p 465. So an Irish Railway Company, incorporated by the same parliament, is a foreign corporation in England, and may be compelled to give security for costs: *Kilkenny, &c., R. W. Co. v. Feilden*, 6 Ex. 81. And the Bank of Montreal is a foreign corporation in Upper Canada, (now Ontario): *Bank of Montreal v. Bethune*, 4 O. S. 341.

The defence raised by the non-payment of the premium raises the question of the *lex loci contractus*, or whether the contract was made in Ontario or New York. This point was only slightly argued; but by it must be determined the question of the defendants' liability. The pleadings in the common law action, which have been brought in before me, raise the issue that a blank form of contract was sent by the defendants from Toronto to their agent in New York, with authority to make a contract and fill up the blanks in New York; but there is no evidence in support of this allegation. The only evidence in



respect of this particular contract is, that it was received from the defendants' agent in New York on the 7th or 8th August, and that on the 11th of August the claimant's cheque for the premium, payable to the order of the defendants, was handed to the defendants' agent, and by him transmitted to the defendants at Toronto, and returned by the defendants to the claimants on the 17th of August, with a letter repudiating the liability.

The right of the claimants depends upon the question by what law the contract is to be governed. The question is usually one of the intention of the parties; but in the absence of any indication of that intention, or of any special circumstances which would show that another place was to govern the contract, it will ordinarily be governed by the law of the place where the final assent is given by the party to whom the proposition is made, or where the company has been incorporated, especially if that is the place where the money is to be paid. But if no place is named for the payment of the money, or if the contract may be performed anywhere, then the law of the place where the contract was entered into governs; and this may further depend upon a consideration of the powers of the agent.

In *Parken v. Royal Exchange Assurance Co.*, 8 Sess. Cas. (Scot. 1846) 363, where an agent received an application for life assurance, and forwarded it to the head office in London, and in due time received back a policy, which he delivered to the insured at Edinburgh, and received from him the premium, it was held that the contract was made in England. The Court laid stress on this, that though no place of payment was in terms provided, England was, in law, that place. So in *Ruse v. Mutual Benefit Life Insurance Co.*, 23 N. Y. 516. In that case the contract was made between the plaintiff and an agent of company in the State of Georgia. The plaintiff was a resident of that State. The defendants were incorporated, and had their head office in New Jersey. The action was brought in one of the New York State Courts, and it was held

that as no place of payment was mentioned, it must be assumed that the payment was to be made in New Jersey, where the principal office of the company was situated; and that the contract must be governed by the law of the State of New Jersey. See also *McGiverin v. James*, 33 U. C. R. 203.

Here the contract appears to have been executed in Toronto; and although no place of payment is mentioned, it must be held that the payment of the insurance money, and therefore the performance of the contract, was to be made in Toronto. And there is nothing in the contract or the evidence to shew that its validity depended upon any special circumstances, or any act to be done by the defendants' agent, which would bring it under the law of New York. This, and the act of the claimants in making their cheque for the amount of the premium payable to the defendants and not to the agent, are matters which affect the consideration of the question by what law the contract is to be governed.

For these reasons it must be held that the contract in question is governed by the law of Ontario; and by that law the non-payment of the premium renders the contract incomplete, and this is a good defence to an action on a policy of insurance: *Walker v. Provincial Ins. Co.*, 8 Gr. 217.

After intimating to the parties my opinion as above, Mr. Falconbridge applied for leave to give further evidence to show that the policy in this case had been signed and sealed in blank by the defendants in Toronto, and forwarded to their agent in New York to be filled up and delivered to the claimants. This application was opposed by the defendants; but I stated I would consider whether such evidence if given would bring the contract under the law of New York.

I think it would not. The agent in New York when filling in the blanks, was giving no greater validity to the contract than a clerk doing the same act in the head office; and such agent's act could only have relation to the act of

the defendants in signing and sealing the policy in Toronto. The act of the claimants in making their cheque payable directly to the defendants, shows what was their view of the authority of the agent.

But analogous cases respecting bills of exchange sustain this view.

In *Snaith v. Mingay*, 1 M. & Sel. 87, a firm resident in Ireland signed, endorsed, and stamped four copper plate impressions of bills of exchange, dated from a place in Ireland, leaving blanks for dates, sums, times of payment, and names of drawees, and then transmitted the bills to their agent in London. The agent there filled up the blanks and negotiated the bills. In an action for the recovery of the amounts of the bills, it was contended that not having English stamps on them they were void; but the Court held that they were to be considered as bills of exchange made in Ireland by relation from the time of the signing and endorsing there, as if they had been drawn in all particulars by the firm's hand, and that they were governed by the law of Ireland; Bayley, J., observing at p. 94, that the act which pledged the credit of the house of *Bayley & Co.*, was their signature in *Ireland*.

So in *Lenning v. Ralson*, 23 Penn. 137, a merchant in Pennsylvania drew a bill of exchange, leaving blank the time for payment, and the names of payee and acceptor. The bill was sent to an agent of the drawer in England, who filled in the blanks and negotiated the bill with a bank there. The Court held that the contract was made in Pennsylvania and was governed by the law of that state; Lewis, J., remarking that when the London bankers became holders of the bill "it bore the dress of a bill of exchange drawn in Pennsylvania." See also *Crutchly v. Mann*, 5 Taunt. 529; *Trimbey v. Vignier*, 1 Bing. N. C. 151.

The claim must therefore be disallowed, with costs.

Affirmed on appeal. See 6 O. R. 223.

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## WELLER V. PROCTOR.

*Notice of trial—Joinder of issue.*

The reply in this action contained two paragraphs, the first denying certain allegations in the fourth paragraph of the defence, and the second joining issue upon the rest of the defence.

Notice of trial was served with the reply.

A motion to set aside the notice of trial was dismissed, because the affidavit filed in support of it did not state that no joinder was filed when the notice of trial was given.

*Seemle*, the joinder of issue referred to in Rule 176 O. J. A., is not a simple denial of a previous pleading.

[April 30, 1884.—*The Master in Chambers.*]

ON the 24th of April, the plaintiff filed and delivered a reply with two paragraphs, in the first of which he denied directly certain allegations in the fourth paragraph of the statement of defence, and in the second he joined issue upon the balance of the defence. Notice of trial was served on the same day.

*Aylesworth* now moved on notice to set aside the notice of trial on the ground of irregularity, in that the same was given prematurely before the pleadings in the action were closed.

*Holman*, contra, contended that it was not negatived in the affidavit filed in support of the motion, that no joinder was filed when notice of trial was given; that so far as the affidavit shewed a joinder might have been put in by the defendant on the 24th of April; and that the first paragraph was equivalent to a joinder of issue, in that it was a simple denial of an allegation in the statement of defence.

THE MASTER IN CHAMBERS held that the material filed was insufficient to support the motion, and while expressing the opinion that the joinder of issue referred to in Rule 176 O. J. A., was the well recognized form of joinder of issue, and not simply a denial of a previous pleading, dismissed the motion, without costs.

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## ROBSON v. ROBSON.

*Partition—Creditors—Inquiry for—G. O. Chy. 640.*

Sales by the Court of real estate, held in co-tenancy, are governed by the provisions of the Partition Act, R. S. O., ch. 101, and Masters should not, without very special and sufficient reasons, dispense with enquiries and advertisements for creditors holding specific or general liens upon the whole or any undivided share of the estate, but should ascertain and report what incumbrances affect the property or any undivided share thereof down to the time of sale, and not merely at the time when the order under G. O. Chy. 640 is made.

[May 13, 1884.—*Boyd, C.*]

*Meek*, for the purchaser, moved for a reference to the Master in Ordinary to take further accounts and enquiries as to incumbrancers.

*Bigelow*, for the plaintiff.

The facts appear in the judgment.

BOYD, C.—In this case the report will have to go back to the Master that he may complete it by ascertaining what incumbrances affect the property down to the time of the sale. The practice adopted by him in ascertaining incumbrances appears to be that which is applicable to mortgage cases as defined in *Wallbridge v. Martin*, 2 Ch. Cham. 275, and he has therefore reported on 21st March, 1884, that there are no incumbrances on the whole or any of the shares. The usual order in Chambers for partition or sale under G. O. 640, and form 172 of the O. J. A., was pronounced on the 15th May, 1882. There is no explicit finding in the report as to when the Master decided that a sale was more beneficial than a partition, but the first sale of one part of the land was made at auction to the purchaser who now petitions, on the 17th November, 1882, and the sale of the other parcel was made to him by tender on the 25th April, 1883.

It now appears by the affidavit of the purchaser that there were certificates of *lis pendens* registered against one or more of the owners, the defendants, in November, 1882,



and February and June, 1883, and also that executions were placed in the sheriff's hands affecting the shares of some of the owners in November, 1882, and November, 1883.

One *lis pendens* and one execution were before the first sale. The purchaser, misled by the form of the report, made no search as to title, and took a conveyance from the joint owners, with the usual covenants, and paid his purchase money into Court, where it now is. Upon going to register his deed he discovered three outstanding registrations and executions. It is not yet too late to give him relief, the purchase money representing the land being still in Court, by calling in these incumbrancers and awarding them what they are entitled to out of the proceeds of sale.

These executions and registrations are matters which affect the title, and had they been discovered in time, the purchaser might have objected to complete till they were removed. Though coming in *pendente lite* they attach upon the legal estate vested in the co-owners, and form at the lowest estimate clouds upon the title : *Piers v. Piers*, 1 Dr. & Wal. 265 ; *Craddock v. Piper*, 14 Sim. 310; and it may be more serious than this. See R. S. O. ch. 101, sec. 21, sub-sec. 2, and sec. 50.

In cases of sale of real estate held in co-tenancy, the Court should have regard to the provisions of the Partition Act, R. S. O. ch. 101, and not without some very special and sufficient reason should the Masters, under the compendious reference to them, dispense with enquiries and advertisements for creditors holding specific or general liens upon the whole estate or any undivided share thereof, as directed by sections 43, 44, and 46 of that statute. This advertisement may be combined with the advertisement for creditors of the testator or intestate, where the proceedings are in the nature of an administration. These enquiries may go on contemporaneously with the proceedings to sell, and their object is not only to clear the title, but to inform the Court as to the proper recipients of the proceeds of the property sold.

It is referred back to the Master to bring in these persons who have become incumbrancers *pendente lite*, which may be done under G. O. Chy. 244: *Lindsay v. Bank of Montreal*, 13 Gr. 66, and he should also advertize for creditors having liens or incumbrances in the proper county. Upon his report a further application may be made as to the distribution of the purchase money, and the clearing up of these objections to the title. The plaintiff having the carriage of the proceedings should have had the report in proper shape, and the petitioner should have ascertained what he now complains of before accepting the title and taking a conveyance. I give no costs therefore to either party of the application, but will let the subsequent costs be disposed of as if the objection had been raised in the Master's office at the proper time.

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McLAUGHLIN V. MOORE.

*Examination—Witnesses—Breach of promise of marriage.*

Since the passing of 45 Vic. (O.) ch. 10, sec. 3, the parties to an action for breach of promise of marriage are both competent and compellable witnesses, and may therefore be examined under the C. L. P. Act.

[September 23, 1884.—Osler, J. A.]

*Aylesworth*, for the defendant, appealed from the order of the local Judge of the High Court at Goderich, rescinding an order made *ex parte* at the instance of the defendant, for the examination under the C. L. P. Act of the plaintiff in the action, which was for breach of promise of marriage. The local Judge made the order appealed from, following *Jones v. Gallon*, 9 P. R. 296, and holding that the parties to an action of this kind are not made *compellable witnesses* by 45 Vic. (O.), ch. 10, sec. 3, but only *competent witnesses*.

*W. H. P. Clement*, for the plaintiff, contra.

OSLER, J. A.—Allowed the appeal, holding that the parties to an action for breach of promise of marriage are now compellable witnesses.

## TILSONBURG MANUFACTURING COMPANY V. GOODRICH.

*Examination—Parties.*

The former Chancery Practice as to the stage of the cause at which examination of parties may be had, now governs in all Divisions of the High Court.

In this case an appointment to examine under sec. 159 of the C. L. P. Act was set aside because the affidavit required by that section had not been filed.

[October 2, 1884.—*The Master in Chambers.*]

*Aylesworth*, for the plaintiffs, in an action in the Queen's Bench Division, moved to set aside an appointment and subpoena issued by the defendant for the examination of an officer of the plaintiffs. The appointment and subpoena were taken out before issue joined, but after delivery of defence. No affidavit was filed as directed by sec. 159 of the C. L. P. Act (R. S. O. ch. 50), with the officer who issued the appointment.

*E. Meek*, for the defendant, shewed cause.

THE MASTER IN CHAMBERS held that the former Chancery Practice as to the stage of the cause at which examination of parties might be had, was now applicable to all Divisions of the High Court of Justice, but he set aside the appointment because the affidavit required by sec. 159 of the C. L. P. Act was not filed.

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## MCLAREN V. CANADA CENTRAL RAILWAY COMPANY.

*Judgment—Interest—Rule 326, O. J. A.*

On the 23rd January, 1882, the following judgment was pronounced in Court by OSLER, J. A.:—"I direct judgment to be entered for the plaintiff against the within named defendants after the fifth day of next Hilary Sittings, for \$100,000."

Hilary Sittings ended on the 25th February, and judgment was formally entered with the Clerk of the Court on the 24th March as of the 23rd January.

*Held*, that Rule 326 did not apply to this case: that the judgment should be dated on the day of its entry with the clerk, and from that date only, under Rule 327, interest should run.

*Keleher v. McGibbon*, 10 P. R. 89, explained.

*Held*, also, on the facts stated in the special case, that the plaintiff and defendants should each pay their own costs of the interpleader, and each one moiety of the costs of the railway company and of the sheriff.

[September 26, 1884.—*The Master in Chambers.*]

THE following special case was submitted for the decision of the Master in Chambers:

Statement of facts.

1. On 23rd January, 1882, the plaintiff obtained a verdict against the defendants for \$100,000. Immediately after verdict counsel for plaintiff moved for judgment, and Mr. Justice Osler, before whom the case was tried, endorsed the record as follows: "On motion by counsel for the plaintiff for judgment on the finding of the jury upon the questions submitted to them, I direct judgment to be entered for the plaintiff against the within named defendants after the 5th day of next Hilary Sittings for \$100,000."

2. The defendants moved in the following term to set aside the verdict, and on March 10th, judgment was given in the Common Pleas Division in favour of the plaintiff, and the defendant's order *nisi* discharged with costs. On March 24th, judgment was entered, which judgment was dated as of January 23rd.

3. On 25th April, after notice of appeal to the Court of Appeal had been served, but before security had been given, executions were issued endorsed to levy \$100,000, interest thereon from January 23rd, 1882, etc.

4. The sheriffs of the several counties through which the defendants' railway runs acted upon the executions at once, and seized a considerable quantity of the defendants' rolling stock, &c., to all of which claims were made in due course by the Canadian Pacific Railway Company.

5. One of the sheriffs, viz., the sheriff of Leeds and Grenville interpleaded, and while the interpleader motion was pending, to wit, on May 5th, the defendants gave a bond to the satisfaction of the plaintiff for the whole amount covered by the executions and the costs of the Court of Appeal.

6. No affidavits were filed in support of the claim of the Canadian Pacific Railway Company to the property seized, and the plaintiff and the Canadian Pacific Railway Company were prepared to take an issue, if such issue had not been rendered unnecessary by the occurrence of the facts hereinafter set forth. On May 17th, an order was made in Chambers disposing of the interpleader application by directing that the sheriff withdraw from the seizure, and that the question of costs of the application and all other questions be reserved until after the decision of the appeal to the Court of Appeal.

7. The Court of Appeal subsequently gave judgment dismissing the appeal, with costs.

8. The defendants appealed to the Privy Council, but their appeal was dismissed, with costs.

The defendants have paid the plaintiff's claim with the exception of interest on the verdict from 23rd January to 24th March, 1882, that is to say, between the dates of the verdict and the entry of judgment. It has been agreed between the parties that the following questions should be submitted to the Master in Chambers in lieu of proceeding by notice supported by affidavit with right to either party to appeal in the usual course as if notice of motion had been given :

1. Is the plaintiff entitled to interest from 23rd January, or 10th March to 24th March, or from what date ?

2. By which party and in what proportions should the



costs of the interpleader application, that is to say the costs of the plaintiff, defendants, Canadian Pacific Railway Company and the sheriff be borne.

3. The question of costs of this application is to be in the discretion of the Master, or of the Court or Judge before whom the same may ultimately be decided.

Dated at Toronto this 9th day of September, 1884.

*W. H. P. Clement*, for the plaintiff.

*A. H. Marsh*, for the defendants, referred to Rules 326, 345, 351; *Winkley v. Winkley*, 44 L. T. 572; *Keleher v. McGibbon*, 10 P. R. 89.

THE MASTER IN CHAMBERS.—First, as to the interest claimed by the plaintiff as above. In this case the judgment pronounced at the Assizes by the Hon. Mr. Justice Osler, was in these words: "I direct judgment to be entered for the plaintiff against the within named defendants after the 5th day of next Hilary Sittings, for \$100,000."

This judgment was pronounced in Court on the 23rd January, 1882. It must be observed that Rule 527 under the Judicature Act was not adopted till the 17th March, 1882. See sec. (b) of that rule which declares that, "In cases tried by a jury, judgment shall not be signed until the time for making such motion or application" (referred to in sec. a) "has expired," except in special cases. It was the absence of such a rule, no doubt, which occasioned the learned Judge in this case to pronounce a judgment postponing the entry of that judgment as is above mentioned. The old practice in common law actions, and Rule 527, since passed, reviving that old practice, shew what was the intention of the learned Judge in directing the judgment to be entered after the 5th day of the next sittings. The right to judgment was postponed by the learned Judge, as well as the entry of it. Such are the words and such the manifest intent.

The result I have arrived at as to the interest is, that

the plaintiff is not entitled to interest for any time prior to the 24th March, mentioned in the special case.

A case has been cited to me decided in Chambers last November—*Keleher v. McGibbon*, 10 P. R. 89, where it was held that in endorsing a writ of execution to levy interest upon the amount of a judgment pronounced in Court, the interest is to be computed from the day of pronouncing the judgment, not from the day of the formal entry thereof. I am still of opinion that that case is right. The facts of that case do not appear upon the judgment but the plaintiff was there entitled, or was assumed to be entitled to immediate judgment with a stay of 'execution,' and upon that footing it was that the decision was made.

I think that Rule 326 does not apply to the present case. It is meant for the case where the party is entitled to the judgment at the time that it is pronounced, and not to a case where, as here, the entry of judgment and the right to judgment are postponed by the terms of the very judgment itself. For otherwise the rule would give by relation a right which is negatived on the face of the judgment; and so by implication it would take away from the Court the power of moulding a judgment as to the time when it should take effect, as the Court might well see that justice and convenience required.

Several cases of conditional judgments are mentioned in the rules, but the cases there put are not exhaustive. Law and equity are now in one, and judgments of an equitable nature are very discriminating in their directions as to the rights of the parties in particular cases. No cast-iron forms are possible, and I cannot think that it could be intended in any way to fetter such a power; and why might it not happen that justice should require the postponing of the operation of a judgment for a certain time? Justice did require it in this case.

The Rule in England (571) corresponding to our Rule 326 was originally exactly in the words of 326. The English rule has since been amended—it now stands as follows: (see *Wilson's Judicature Act*, 4th ed., p. 390) "Where any

judgment is pronounced by the Court or a Judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the Court or Judge shall otherwise order, and the judgment shall take effect from that date: Provided that by special leave of the Court or a Judge a judgment may be ante-dated or post-dated."

But the case of *Winkley v. Winkley*, 44 L. T. 572, which was decided in 1881, when the rule stood as our rule now stands, shews that by consent a judgment may be ordered to be entered as of a different date where convenience requires it.

The English rule has been amended out of abundant caution—to make more plain the rights—but I think those rights existed before the amendment of the rule. And without any decision in point I should be of opinion that the judgment itself must regulate where it postpones the right. For where in this case, for instance, is the authority for making the plaintiff a judgment creditor of the defendants on the 23rd January, while the judgment in plaintiff's favour, which alone warrants the entry, gives him only the right to become such creditor on a day in the following February?

Then it follows that the case is within Rule 327, and plaintiff is not entitled to interest for any time before the 24th March.

The date of the judgment must be changed from the 23rd January to the 24th March.

As to the interpleader costs. It is of course only between plaintiff and defendants I am to decide, as neither the sheriff nor the Canada Pacific Railway are before me. I am authorized by what has occurred in saying that it is only the costs incident to the interpleader motion that I am to deal with—a trifling sum.

When the sheriff seized, the Canada Pacific Railway claimed. It was then argued that the sheriff should go out of possession till the decision of the appeal. At the time of that arrangement it was manifest that the question

in interpleader would never arise to be decided, which ever way judgment in appeal went, for perfect security had been given on the appeal, which fully provided for the case of the plaintiff's success; and in the case of plaintiff's failure, still less could the question in interpleader ever be a matter of issue between the parties.

As the plaintiffs and defendants voluntarily placed the case in that position where there never could be a decision as to the right to these costs, I can only say that they must be provided for by the parties in equal portions.

I order that the plaintiff and defendants each pay their own costs of the interpleader, and one moiety of the costs of the Canada Pacific Railway, and of the sheriff.

As to the costs of this application, I order that the plaintiff shall pay his own costs, and also the defendants' costs thereof.

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## MERCHANTS BANK V. MONTEITH.

*Imperial Act 38 Geo. III. ch. 87—R. S. O. ch. 40, secs. 34, and 35, ch. 46, sec. 32—Appointment of infant administrator—Nullity of suits by an infant—Liability for costs.*

The 6th sec. of 38 Geo. III. ch. 87 (Imperial), prohibiting the grant of probate to infants under the age of 21 is in force in Ontario, either as a rule of decision in matters relating to executors and administrators (R. S. O. ch. 40, sec. 34 and 35) or as a rule of practice in the Probate Court in England (R. S. O. ch. 46, sec. 32).

An infant cannot lawfully be appointed administrator of an estate; and therefore a grant of probate or of letters of administration to an infant is void, and confers no office on, and vests no estate in such infant.

An infant had been appointed administrator of an estate, and various suits had been brought in his name on behalf of such estate:

*Held*, that being an infant he was incapable of bringing suits in his own name, or of making himself or the estate he assumed to represent liable for the costs of such suits.

The 57th and 58th sections of the Surrogate Act (R. S. O. ch. 46), protects parties *bonâ fide* making payments to an executor or administrator notwithstanding any invalidity in the probate or letters of administration, but they do not protect payments made to third parties by an infant assuming to act as administrator of the estate.

[September 29, 1884.—*The Master in Ordinary.*]

An administration action.

*Rae*, for the plaintiffs.

*J. A. Patterson*, for the creditors.

*Black*, for the infant respondent.

*J. Macgregor*, for the defendant Pritchard.

MR. HODGINS, Q. C., MASTER IN ORDINARY.—In this case the executors named by the testator renounced probate, and the Surrogate Court granted letters of administration, with the will annexed, to the defendant Monteith, who, as appears by the evidence taken in this matter, was then and still is an infant under the age of twenty-one years.

The administration order directs the usual accounts of the dealings of the infant defendant with the assets of the estate; and in proceeding to account for such assets this defendant has brought in accounts shewing the payment of nearly the whole assets of the estate to a solicitor for the purposes of litigation.

During the proceedings before me this solicitor claimed to act for and represent this infant defendant without the



usual and necessary appointment of a guardian *ad litem*; and he contended before me that such payment of the bulk of the assets of the estate to him, as solicitor for this infant, was rightful, and he relied on *Re Babcock*, 8 Gr. 409, as warranting the payment. The official guardian being unable to attend for this infant defendant, I appointed Mr. Black to act as his guardian *ad litem*.

It must be to ordinary minds difficult to perceive how an apparent authority to retain \$200 (*Re Babcock supra*) on account of costs which, as the report shewed, had been incurred to a larger amount, could be cited to warrant an administrator handing over \$3,385.78—nearly the whole cash assets of the estate—to a solicitor, within a few months of his appointment, for the purposes of litigation, and without any bills of costs or other evidence of the necessity of such payment. But such a claim is made, and such an argument is strenuously advanced in this case.

In view of this contention, it is proper to consider whether the letters of administration granted to the infant defendant are voidable or void. Since the payment to the solicitor, and during the proceedings in this office, the grant of letters has been revoked by the Surrogate Court, and administration *durante minore ætate* has been granted to the defendant Pritchard.

The statute (Imp.) 38 Geo. III., ch. 87, sec. 6, enacts: "And whereas inconveniences arise from granting probate to infants under the age of twenty-one, be it enacted that where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the spiritual Court shall think fit, until such infant shall have obtained the full age of twenty-one years, at which period, *and not before*, probate of the will shall be granted to him."

In a note to *Ex parte Sergison*, 4 Ves. 147, it is stated that the circumstances of that case had considerable effect in producing the above Act of Parliament. The Master of the Rolls in disposing of the case would not permit an infant, though he was an executor, to receive the money of

the estate ; and in his judgment he intimated that the Legislature should forbid the ecclesiastical Court granting probate to an infant.

In *Hindmarsh v. Southgate*, 3 Russ. 324, it was argued that "an infant could not be lawfully clothed with the character of administrator;" and the Court refused to direct an account against an infant who had been appointed administratrix.

In *Re Cunha*, 1 Hagg. 237, the Court gave effect to the Portuguese law, and granted limited administration to a minor. But that case was not followed in similar applications to appoint minors as administrators : *In re Manuel*, 13 Jur. 664, where Sir H. Jenner Fust declined to give effect to the law of Turkey, and grant probate to a minor ; or in *Re Duchesse d' Orleans*, 7 W. R. 266, where Sir C. Cresswell similarly declined to recognize the law of France, adding that in England a minor could not take upon himself the liabilities which the law casts upon an administrator.

It is further stated : "A minor cannot be administrator because he cannot execute the bond which is required by the Act of Parliament, or rather because the authority of the administrator is derived from the statute Edward III., which must receive a legal construction, and therefore the administrator must be of age according to the common law, which is twenty-one:" *Dodd & Brooke's Prob. Pr.* 404.

And in 1 *Williams on Executors*, 231, 7th ed., it is said : "If an infant be appointed sole executor, \* \* he is altogether disqualified from exercising his office during his minority."

A similar disqualification exists in the United States.

In *Carow v. Mowatt*, 2 How. N. Y. 57, the Vice-Chancellor said : "On account of the incompetency of infants to bind themselves by bond or to render themselves liable to account for property which may come into their hands during minority, they cannot lawfully be appointed to fill the office of administrator. If through mistake or inadvertence the appointment has been conferred upon an infant, it may be revoked by the Surrogate Court." And

in *Collins v. Spears*, Walk. (Miss.) 310, the Court held that it was error in a Probate Court to grant administration to a minor, although such minor was the widow of the deceased ; and they revoked the letters of administration.

The negative words in the English statute prohibit the granting of probate to an infant, and therefore must be construed as taking away any jurisdiction the Probate Court might have had prior to the statute to make such grants : *Dwarris* on Statutes, 743.

The Imperial Act, whether classed as prescribing "a rule of decision in matters relating to executors and administrators" (R. S. O. ch. 40, secs. 34, 35,) or "a rule of practice in the Court of Probate in England," (R. S. O. ch. 46, sec. 32) is in force in Ontario. See also *Grant v. Great Western R. W. Co.*, 7 C. P. 438, 5 U. C. L. J. 210 ; In *re Thorpe*, 15 Gr. 75.

It must therefore be held that the grant of letters of administration to this infant against the negative mandatory words of the statute, was a nullity, and conferred no office, and vested no estate in him as administrator with the will annexed.

There is evidence that various suits have been brought in the name of this infant as administrator, and that others have been brought against him in respect of this estate, and a claim is made that the costs of such suits should be allowed in his accounts.

If the letters of administration are void *ab initio*, this infant defendant has been dealing with the estate as a stranger, and his acts will not bind the estate. On this and other grounds I see no authority for allowing such costs.

In *Mitford* on Pleading, p. 25, it is said : "An infant is incapable by himself of exhibiting a bill, as well on account of his supposed want of discretion, as his inability to bind himself and to make himself liable to the costs of the suit." The case there cited is *Turner v. Turner*, 2 Stra. 708, where Lord King, L. C., held that by the common law an infant could give no pledges : that the power of

infants to sue by *prochein ami* was introduced by the statute Westminster 2nd ; and he added that no case had been cited where an infant had been obliged to pay costs either at law or in equity.

And in *Macpherson* on Infants, p. 361-2 : " If judgment has been given against an infant in an action to which he has appeared by attorney, that is error, upon which the judgment would be reversed ; for the same reason a judgment upon a warrant of attorney given by an infant is liable to be vacated, and a warrant of attorney by an infant to confess judgment is absolutely void, and the Courts cannot in any case make it good."

The incapacity of an infant and a *non compos* run parallel : *Hume v. Burton*, 1 Ridgw. P. C. 89, 100, 203.

An infant is, in the eye of the law, *infans*, *i. e.*, speechless, or, in other words, unable to speak for himself in ordinary matters of contract : *Golding's Petition*, 57 N. H. 149.

No cases have been cited to me to sustain the claim made in respect of these costs, and therefore I must, on the authorities referred to, hold that the grant of administration was void, and that the defendant being an infant was incapable of bringing suits in his own name, or of making himself or the estate he assumed to represent liable for the costs of the extensive litigation in which he appears to have been a party.

The solicitor is not technically a party to these proceedings, and the report, therefore, while it will lay the facts brought out in evidence before the Court, will be no adjudication as to him.

Sections 57 and 58 of the Surrogate Act, R. S. O. 46, are intended as a protection to parties *bonâ fide* making payments to an executor or administrator notwithstanding any invalidity in the probate or letters of administration ; but they have no application here, nor do they protect the payment of the moneys of the estate made by this infant to the solicitor in this case.



## CLARKE V. UNION FIRE INSURANCE COMPANY.

## CASTON'S CASE.

In proceeding on a judgment for winding up a company, the former solicitor of the company brought in a claim for bills of costs alleged to be due him, which the former Master referred to one of the Taxing Officers to tax.

*Held*, that the Master had authority to direct such reference.

On such a reference the Taxing Officer gives his opinion as to whether the fees and charges claimed should be allowed or disallowed, and on that opinion the Master makes his adjudication.

The Taxing Officer has a discretion as to the attendance of parties claiming a right to attend on such taxation, and his discretion will not be lightly interfered with.

The Taxing Officer's allocatur is sufficient proof that the business charged for was done by the solicitor.

The rule requiring special circumstances to warrant the reopening or taxation of a bill of costs after twelve months, does not apply where the bill has been delivered after a company has been ordered to be wound up.

The General Manager of a company had authority to do acts which occasionally required legal advice:

*Held*, that he had implied authority to retain a solicitor whenever in his judgment it was prudent to do so, but that such authority ceased on the suspension of the company.

Where the directors of a company had power to appoint officers and agents and dismiss them at pleasure:

*Held*, that their appointment of a solicitor need not be under the corporate seal.

Where a solicitor had instructions to defend a suit, which was discontinued and a new one for the same cause of action was commenced:

*Held*, that the original retainer to defend continued in the new suit.

A solicitor for a company is entitled to charge such company for special work and journeys undertaken at the request of individual directors and the general manager.

In proceeding under a judgment for the winding up of a company, the Master has the same jurisdiction to try claims for unliquidated damages arising out of breach of contract as he would have in an administration proceeding.

Where a conditional agreement to take shares in a company is broken the shareholder is freed from liability on such shares.

But where the agreement is collateral the shareholder is liable on such shares, but has a right of action for indemnity or damages against such company.

The Court will not allow its administration of assets to be interfered with by other proceedings, affecting the estate; and creditors of such estate bring their rights with them into the Master's Office, which the Court substitutes for proceedings at law.

[December 14, 1883. } *The Master in Ordinary.*  
[October 30, 1884. }

UNDER a judgment for winding up the company and adjusting the claims of creditors, a claim for bills of costs alleged to be due by the company to their former solicitor



was made before the former Master, and by him referred to one of the taxing officers, who certified his taxation as between solicitor and client. On the filing of the allocatur, certain objections were made by the defendants which were overruled. The defendants then applied to re-open the taxation, on an affidavit made by one of the defendants' solicitors, that to the best of his knowledge and belief no notice of the taxation before the taxing officer had been served upon him or his firm.

The general facts of the case appear in the judgment.

*F. E. Hodgins*, for the claimant.

*Bain*, Q. C., for the defendants.

*Foster*, for the plaintiff.

MR. HODGINS, Q. C., MASTER IN ORDINARY.—This application to re-open the taxation may be refused on other grounds than the insufficiency of the affidavit. It is in evidence that while the taxation was proceeding one of the defendants' solicitors appeared before the taxing officer, and requested to be notified of the proceedings before him, which it appears the taxing officer did not accede to: that about four months after the issue of the allocatur, the claimant-solicitor applied to the receiver to allow the amount certified in the allocatur against the special deposit in Court, on which latter occasion the defendants' solicitors opposed the application, and contended that the claim should be made in the name of the claimant-solicitor, and not in that of his firm.

The taxing officer informs me that pending the taxation, one of the defendants' solicitors appeared before him, and raised no objection to the taxation except that the bills of costs should be taxed in the name of the claimant-solicitor alone, and not in the name of his firm, alleging that the solicitor was a stockholder in the company, and was indebted to it as such.

Either act of the defendants' solicitors is an answer to the present application. If the act was as stated

by the taxing officer, then there is proof of notice and acquiescence. If the act was as stated by the defendants' solicitor, then, besides notice, it appears that the taxing officer exercised a discretion as to the attendance of the parties claiming a right to appear before him; and the case of *Stahlscmidt v. Lett*, 9 W. R. 830, shews that his discretion will not be lightly interfered with; and *a fortiori* where there has been a delay on the part of the party complaining of thirteen months.

The practice of sending bills of costs to a taxing officer for taxation or moderation, has long prevailed; and is as stated by Sir R. T. Kindersley, V. C., in *re Lett*, 10 W. R. 6, "the usual course, as part of the policy of the law." The Master to whom the bill is referred requests a taxing officer to give his opinion as to whether the proceedings charged for, and the fees claimed therefor, should be allowed or disallowed; and on that opinion, as shewn by his allowance or disallowance of items, the Master makes his adjudication. It was competent to the former Master to refer these bills to the taxing officer, and for the latter officer to certify his taxation. I must therefore give due credit to the acts of the officers referred to.

It is claimed that the bills of costs were delivered more than a year before the taxation, and when the defendant company was in liquidation. But the statutory rule requiring "special circumstances" after a year, to warrant the re-opening or taxation of a bill of costs, has been held not to apply where prior to the delivery of the bills the company had been ordered to be wound up: *Re Marseilles Co.*, L. R. 11 Eq. 151. I refuse the application to re-open the taxation, and must dispose of the case on the merits.

The claimant-solicitor held a retainer under seal from the company; but on the 6th July, 1881, the directors cancelled his retainer without naming a new solicitor.

Some of the bills of costs are for suits commenced after July, 1881; but there is evidence to shew that various matters, out of which some of the suits arose, were in the claimant-solicitor's hands prior to that date, and it is

proved that the instructions for these suits were given by the general manager after the cancellation of the retainer under seal.

It is contended that the general manager had no authority to retain a solicitor without a resolution of the board of directors. The by-laws authorized the general manager to compromise claims and to do other acts which would occasionally require legal advice. The directors had appointed no new solicitor; their meetings were monthly, or less frequently, and suits were instituted against the company between the times of their meetings. I therefore think it may reasonably be inferred that the general manager had implied authority to retain a solicitor whenever it was in his judgment prudent to do so: *Morawetz on Corporations*, 226.

After the suspension of the company's license, and the initiation of proceedings for the compulsory winding up of its affairs, this implied authority of the general manager ceased, and a retainer given subsequent to that suspension will not bind the company.

It is further objected that the retainer was not under the corporate seal. The company's Act, 39 Vic., c. 93, s. 7, O., gave the directors power to appoint officers and agents, and to dismiss them at pleasure. Under a similar power it was held that the appointment of a solicitor for a corporation need not be under the corporate seal: *Regina v. Justices of Cumberland*, 5 D. & L. 431, 12 Jur. 1025.

Under the original retainer the claimant-solicitor defended a suit which had been brought against the company prior to July, 1881, but as it had been commenced before the time limited by the policy it was discontinued, and a new suit was commenced in the September following. Acting under the instructions given for the prior defence the claimant-solicitor accepted service of the writ and defended. I think the original retainer to defend continued in the new suit, and that the solicitor is entitled to his costs, both suits being for the same cause of action *Crook v. Wright, Ry. & Mo.* 278.

In the bill of costs for general business there are charges for special work and journeys undertaken for the company at the request of the individual directors and of the general manager. These officers must be held to have so acted as agents of the company, and on the authority of *Re Snell*, 5 Ch. D. 815, I think these charges are allowable.

The defendants contend that there is no evidence to support the charges made in these bills of costs. I think the taxing officer's allocatur is sufficient proof of the business done by the claimant-solicitor for these defendants: *Lee v. Jones*, 2 Camp. 496.

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The claimant, with his bills of costs, also brought in a claim for damages for wrongful dismissal by the company, alleging that he agreed to take shares in the company in consideration of his being appointed solicitor. The claim was not then proceeded with, but he claimed the right to bring it up again. After the judgment on further directions, and when the liability of the shareholders was being ascertained, the claimant again applied to prove his claim for damages.

The application was opposed by the defendants chiefly on the ground that the Master had no jurisdiction to try a claim for unliquidated damages, and that such a claim must be tried by a separate action.

*F. E. Hodgins*, for the claimant.

*Bain*, Q. C., for the company.

MR. HODGINS, Q. C.—The original judgment directed me to take an account of the debts and liabilities of the company; and the judgment on further directions continues the accounts and inquiries under the prior judgment. Either under these judgments, or rule 541 *a*, I have jurisdiction to deal with the application now made.

Creditors who omit to file their claims within the time



limited may come in and prove their claims before report by leave of the Master, and after report on application in Chambers so long as the fund remains in Court: *Lashley v. Hogg*, 11 Ves. 602; *Gillespie v. Alexander*, 3 Russ. 130; *Holmsted's R. & O.* 120.

This creditor made his claim for damages under the original judgment, but it was not disposed of for reasons which I then gave, one of which was that the claim appeared to be *damnum absque injuriâ*, no liability for calls—from which only his right of action would arise,—having been then established.

Now it appears that calls must be made; and this question of the alleged agreement under which the shares were taken must be disposed of. If he establishes an agreement as alleged, and if it is found to be a conditional one, violation by the company might free him from liability on the shares: *Pellatt's Case*, L. R. 2 Ch. 527. But if it is found to be a collateral agreement, then its violation by the company would not free him from the liability: *Elkington's Case*, L. R. 2 Ch. 511; and he might, on the *quære* in the case cited, pursue a claim against the company to be indemnified against the calls; or he might claim damages for breach of the agreement: *Mudford's Claim*, 14 Ch. D. 634.

The contention of the defendants that I have no jurisdiction, either in an administration or a winding up case, to try a question of unliquidated damages is not sustained by the authorities. In *Sutton v. Mashiter*, 2 Sim. 513, against a similar objection in an administration suit, Sir L. Shadwell, V. C., restrained an action for unliquidated damages arising out of breaches of a covenant to repair, and held that the party suing was “in the character of a creditor,” and that his claim must be referred to the Master, who could, as well as a jury, ascertain whether any breach of covenant had been committed, and what was the amount of the damages. A similar jurisdiction exists in winding up cases: *Claim of Ebbw Vale Co.*, L. R. 8 Eq. 14; *Ex parte Appleyard*, 18 Ch. D. 587.



*Whittaker v. Wright*, 2 Hare 310, 12 L. J. Ch. 241, 7 Jur. 320, and similar cases, show that when a decree is made in a creditor's suit, under which creditors may come in, the Court will not allow the administration of the assets to be embarrassed by other proceedings affecting the estate administered; and that when a creditor is restrained from enforcing his rights at law, it is upon the principle of allowing him to bring his legal rights with him into the Master's Office, which the Court substitutes for the proceedings at law.

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### KEEFER V. MCKAY.

*Vendor and purchaser—Registration—Cloud upon title.*

The registration of any instrument which casts doubt or suspicion on the title, or which embarrasses the owner in maintaining his estate, or in disposing of his property, is a cloud upon the title against which the Courts will relieve. And in such case it is sufficient if there is a registered instrument apparently valid on its face, accompanied by a claim of title, although an intruder on the claim of title, which is likely to work mischief to the real owner.

A purchaser at a sale of lands held under an order of Court objected to the title on the ground that four deeds had been registered against half of the lot by parties who apparently had no title, but one of whom had notified the purchaser that he claimed some interest in the lands.

*Held*, that such registered deeds were clouds upon the title, and that the purchaser could not be compelled to take it.

[October 20, 1884.—*The Master in Ordinary.*]

A REFERENCE under a decree for sale.

The facts appear in the judgment.

*W. Fitzgerald*, for the purchaser.

*E. T. English*, for the vendor.

MR. HODGINS, Q. C., MASTER IN ORDINARY.—In this case there has been a sale of land under an order of Court, and the purchaser objects to the title, on the ground that four deeds affecting the east half of the lot have been regis-

tered in the registry office, and are, as he contends, clouds upon the title, which the vendor is bound to remove. In support of his objections he produces the registrar's abstract of title, and an affidavit shewing that one of the parties to these deeds notified him that he claimed some title or interest in the land.

The vendor contends that these deeds convey no title to the parties registering them, that he is not bound to have them removed from the registry office, and that he is ready and willing to give the purchaser possession of the lot.

The policy of the law, in providing for the registration of instruments affecting land, is to make the registry office the place where the written records of title to every man's property must be registered; to make the registration of every instrument notice, at equity and in law, to all persons claiming subsequent to such registration; and to enforce that policy the statute gives such a potency to the act of registration that a second and subsequent deed from the one grantor becoming registered will divest a prior grantee of an estate conveyed to him by an unregistered deed, and vest such estate in the second or subsequent grantee.

Any registration therefore which intrudes a bastard instrument upon the succession of title, not kin to the title registered against a property, and which is calculated to cast doubt or suspicion upon the legitimacy of the title, or seriously to embarrass the owner in maintaining his estate, or in disposing of his property, is a blot or cloud upon his title, against which equity will relieve. In such a case it is sufficient that there is a registered instrument apparently valid upon its face, accompanied by some claim of title—although an intruder on the chain of title—which a Court of equity can see is likely to work mischief to the real owner.

The deeds in question in this case do not appear to be void according to the registrar's abstract; and although the registration does not show how the first intruding grantor

became entitled, it cannot with absolute certainty be said that these deeds may not be part of a good title, unless, when impeached, it will appear that they are not aided by proof of an unregistered deed or some valid agreement affecting this land from a party rightfully entitled.

*Dynes v. Bales*, 25 Gr. 593, shews that the Court will decree the cancellation of the registration of deeds which form a cloud upon a title, where the parties executing them are shewn, as it is alleged can be shewn in this case, to have no title or interest in the lands against which such deeds are registered.

It is a principle of all Courts of Equity that they will not sell or enforce a sale of lands with a cloud hanging over the title ; and they will, for the security of the purchaser, refuse to decree the specific performance of a contract for the sale of lands until the title is cleared up : *Gamble v. Gummerson*, 9 Gr. 193. And where the ground on which the title depends is too doubtful to be settled without litigation, or where the purchase would expose a purchaser to the hazard of litigation, the Court will not, to use its favorite expression, compel him to buy a law suit : *Price v. Strange*, 6 Mad. 159 ; *Sloper v. Fish*, 2 V. & B. 145 ; *Elliott v. Pott*, 3 Bligh. 145.

The deeds registered against this land come within the definition of clouds upon the title, and therefore the objection of the purchaser must be allowed.

This case is in Appeal.

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## IN RE THE MERCHANTS BANK V. VAN ALLEN.

*Prohibition—Division Court—Jurisdiction.*

In an action on a promissory note, brought in a Division Court, M., the indorser, was made a defendant by the order of the Judge, and was served by the original defendant, the maker of the note, with a notice claiming relief over and indemnity, but was not served with the summons or a copy of the plaintiffs' demand. M. filed a notice disputing the defendant's claim against him and the jurisdiction of the Court to try it, and also appeared at the trial, and gave evidence and objected to the jurisdiction. Judgment was given for the plaintiffs against both the original defendant and M.

*Held*, that judgment could not have been given against M. in his absence, because the writ of summons and statement of claim had not been served upon him; but that by appearing in the suit and taking part in the proceedings both before and at the trial M. had waived service of the summons and demand.

*Quære*, whether the third party clauses of the O. J. Act apply to Division Courts.

[September 23, 1884.—*Osler*, J. A.]

A motion for prohibition.

The facts appear in the judgment.

*E. Douglas Armour*, for the motion.

*D. M. Christie*, contra.

OSLER, J. A.—The action was brought in the Division Court on January 5th, 1884, against the defendant Van Allen alone, upon a promissory note made by him payable to Marx, and endorsed by him to the plaintiffs.

On the application of Van Allen a summons was granted January 21st, 1884, by the learned Judge of the County Court, calling upon the plaintiffs and Marx to shew cause why Marx should not be added as a party plaintiff or defendant, on the ground that Marx was the beneficial plaintiff, and was the plaintiffs' agent in obtaining the note sued on, and on the ground that if Van Allen was liable to the plaintiffs he was entitled to a remedy over against Marx, and that justice would be promoted by making him a party.

As appeared by the affidavits Van Allen's case against Marx was that the latter had obtained the note from him

by misrepresentation, and upon a consideration which had failed.

An order was made on this summons on January 31st, 1884, which is drawn up on the application of the defendant (Van Allen) and on hearing counsel for the plaintiffs and defendant and no one appearing on the part of Marx. It directs Marx to be added as a party defendant; that defendant Van Allen be "allowed in" to defend the action, and that a copy of the order and of Van Allen's defence be served upon Marx forthwith after filing thereof. He was served with a copy of the order and of the defendant Van Allen's disputing note and statement of defence. The latter merely disputes the plaintiff's claim, and alleges a number of facts, shewing that the note was obtained by the fraud and misrepresentation of Marx, and concludes by saying that if the plaintiffs are entitled to recover against Van Allen, he is entitled to recover against Marx and to have relief over against him and indemnity from him.

Marx, on February 8th, 1884, filed a notice disputing the defendant Van Allen's claim, and the jurisdiction of the Court to try it. He took no notice of the plaintiff's claim, and apparently was never served with a copy of such claim, or of the summons.

At the trial the plaintiffs and Marx objected that the Judge had no jurisdiction to give judgment against Marx, and the plaintiffs made no claim against him. Evidence was given by Van Allen and Marx, and Marx was called as a witness on his own behalf in reference to the subject of their dispute, and the Judge gave judgment for the plaintiffs against both defendants, and found as follows:—"I further find as between the two defendants herein, that no consideration was ever given for the note made by the defendant Van Allen to the defendant Marx, being the note sued on herein, and that if the judgment herein be satisfied by Van Allen, he has his remedy against his co-defendant Marx." Van Allen afterwards paid the judgment or the plaintiffs' claim thereon, and they, at his



request, assigned it to a trustee for him, treating him apparently as being a person entitled to an assignment of the judgment as a surety under the Mercantile Law Amendment Act.

Marx having failed in an attempt to compel the plaintiffs to enter satisfaction on the judgment, now moves to restrain further proceedings, on the ground that the Judge acted beyond his authority, and without jurisdiction in making him a defendant, and in giving judgment for the plaintiffs against him, and making any finding as between him and Van Allen.

What order it might have been proper to make if the defendant Marx had moved for prohibition immediately after the Judge's order making him a party defendant, it is unnecessary now to determine, as I think the case must be disposed of without reference to the question whether the third party clauses of O. J. Act, and rules and powers of adding parties defendants in an action apply to the Division Courts. I may assume in this case that they do not. Then what has been done by the learned Judge. He added as a party defendant a person against whom the plaintiffs had a cause of action which they were not willing to assert, and gave judgment for them against both parties. The proceeding was not under the third party clauses, which provide *inter alia* for bringing in a person against whom the plaintiffs may have no right of action, but against whom the defendant claims some relief or remedy over in connection with the subject matter of the action. Marx then, as I may assume, was improperly brought into the suit, and in his absence the Judge could not have given judgment against him, as the 82nd section of the Act requires, as a preliminary step, proof of due service of the summons and copy of the plaintiffs' demand. Nevertheless it was competent for him to waive service of the summons, and of the plaintiffs' demand, and I think he must be taken to have done so by appearing in the suit and taking part in the proceedings therein both before and at the trial. The case is in principle the same as *Forbes et al. v. Smith*, 10 Ex.

717, where a British subject residing out of the jurisdiction appeared to a writ, and afterwards finding that the cause of action had not arisen within the jurisdiction of the Court, moved to set it aside. He was held to have given the Court jurisdiction by appearing to the writ. See also *Staniforth v. Richmond*, 13 W. R. 724. And it is a principle of practice that a defendant by appearing waives irregularities in the writ, and even the total want of one. I put my decision on this ground, though as there is no want of jurisdiction on the face of the proceedings, I might also rest it on the ground of delay, and that the defendant has taken his chances of contesting the proceedings in the Division Court. See *Re Smart and Reilly*, 7 P. R. 364.

The judgment moreover having been paid by the defendant Van Allen, I do not know that the defendant Marx is as between himself and his co-defendant bound by it. If Van Allen has no rights against him as a surety, he cannot enforce the judgment under the Mercantile Law Amendment Act merely because he has procured an assignment of it, and the finding of the Judge cannot conclude him, inasmuch as it is not by means of any judgment or decree obtained in the Division Court suit in favour of Van Allen that proceedings are being taken against him, but by the judgment recovered by the plaintiffs, which is satisfied by Van Allen's payment thereof, if in the circumstances Marx is not the principal debtor.

I think the motion must be refused, with costs.

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## REGINA V. DILLON.

*Stakeholder—Bet—40 Vic. ch. 31, C.*

The Act 40 Vic. (C) ch. 31, intituled on Act for the repression of betting and pool selling, does not forbid betting, and does not apply to stakeholders in any of the three cases mentioned in sec. 2.

[October 10, 1884.—Osler, J. A.]

*D. C. Ross*, obtained from *Osler, J. A.*, an order for writs of *habeas corpus* and *certiorari* to bring up the body of the prisoner and his conviction by the Toronto Police Magistrate, for unlawfully becoming the custodian of a certain sum of money deposited with him for the purposes of a bet, &c.

*T. C. L. Armstrong* moved, on the return of the writs, for an order for the discharge of the prisoner, on the ground that the conviction was not authorized by the Act 40 Vic. c. 31 (Can.)

*Fenton*, Crown County Attorney of York, shewed cause.

OSLER, J. A.—I am of opinion that the conviction discloses no offence, and that the defendant is entitled to be discharged. He is charged with having become the custodian of money staked by two persons upon a bet between themselves on the result of a boat race.

The Act 40 Vic. 31, "An Act for the suppression of betting and pool selling," forbids under a very heavy penalty the keeping (1.) of premises, and (2.) of any device or apparatus, for the purpose of recording or registering any bet or wager, or selling any pool, (3.) becoming the custodian of money staked, or recording &c., any bet or wager, or selling any pool, upon the result of any race, &c.

Betting is not forbidden by the Act. Its whole scope and object is to restrain the abuse of betting which exists where betting shops, or places for registering bets or selling pools, are kept in which money may be staked in advance or otherwise by all comers, or other forms of gambling upon the result of a race, &c., facilitated. Then

comes the proviso in section two, which enacts that the Act "shall not extend" *inter alia* to bets between individuals. But, as the Act has not forbidden such bets, the only meaning this can have is that so far as a bet between individuals is concerned neither the prohibitions nor the sanction of section two apply to it. I cannot agree with Mr. Fenton's contention that the proviso relates only to the individuals who bet, while it fastens the penalties upon the holder of their stakes. It is the bet which is excluded from the operation of the Act; and as the Act has not forbidden a bet, there can be nothing, where a bet between individuals is accompanied by a deposit, to which that part of the proviso could have any application, unless everything relating to such a bet, including the stakeholder, where there is one, is beyond the scope of the Act. The fact that section two also expressly enacts that the Act shall not extend "to any person" by reason of his being custodian of money staked to be paid to the winner of a lawful race, or to the owner of a horse engaged in such a race, cannot, as it seems to me, limit the construction which the subsequent part of the section, for the reasons I have already given, requires. In short, I read the section as a declaration that the Act does not apply to stakeholders in any of the three cases mentioned in the section, none of which are within the mischief of the Act.

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## WRIGHT V. LEYS.

*Notice of appeal—Computation of time.*

A notice served on Monday October 6th, of an appeal to the Court of Appeal from a judgment given on the 4th of September, was held too late.

[October 11, 1884.—*The Master in Chambers.*]

MOTION to set aside notice of appeal to the Court of Appeal, on the ground that it was served too late under the circumstances shewn in the judgment.

*F. Ruttan*, for the motion.

*Walter Read*, contra.

THE MASTER IN CHAMBERS.—Judgment was given on the 4th September. The 5th of October was a Sunday. The Judicature Act requires notice of appeal to be given “within one month after the judgment complained of.” This is a calendar month. Time for the notice would begin to count on the 5th, the day after the judgment. Then the calendar month would end on the 4th of October, that is, all the 4th of October would be within the month. A calendar month where not exactly coterminous with a given calendar month, is from the day of the commencement (reckoning that day) to and inclusive of the day in the succeeding month immediately preceding the day corresponding to the day of the commencement: *Migotti v. Colvill*, 4 C. P. D. 233; *Freeman v. Read*, 11 W. R. 802.

The notice was served on 6th October, the 5th being on Sunday. But the time had expired on Saturday, the 4th, so that rule 457, O. J. A., cannot help.



## WILSON V. ROGER MCLAY &amp; CO.

*Parties—Partnership—Rule 100 O. J. A.*

The cause of action arose before, and the writ of summons was issued after, the dissolution of the defendants' firm.

*Held*, that the defendants were properly sued in their firm name.

[October 15, 1884.—*The Master in Chambers.*]

[October 20, 1884.—*Osler, J. A.*]

A motion to set aside the service of the writ of summons in this action.

*George Bell*, for the motion.

*Urquhart*, contra.

The facts appear in the judgment.

THE MASTER IN CHAMBERS.—In this case the defendants have been sued in the firm name of their partnership, which existed at the accruing of the cause of action, but was dissolved before the commencement of this suit.

The motion now is on behalf of one of the defendants, who has been served with the summons, to set aside that service, because the partnership had been dissolved before the issue of the writ.

High authorities in the law have dealt with this question. The Lord Chancellor, Lord Justice Cotton, Lord Justice Brett, and Mr. Justice Hawkins have all delivered opinions upon the point. Lord Justice Cotton holding that the action cannot be sustained in this form, where the partnership had been dissolved before action. Lord Justice Brett and Mr. Justice Hawkins being of the contrary opinion, the Lord Chancellor thinking the matter doubtful.

All existing authority on the subject that I am aware of, will be found in *Ex parte Young v. Young*, 19 Chy. D. 124; *Davis & Son v. Morris*, 10 Q. B. D. 436, and

*Munster v. Railton & Co.*, 10 Q. B. D. 475. All views of the question, and all the arguments that bear upon these opposite constructions of the rule, will be found in the above cases.

Under the circumstances I do not presume to discuss the matter at length. I simply refer to the cases. But I have to decide as I think the law, and it is proper that I should give my reason for it.

The words of the Rule are: "Any two or more persons, being liable as co-partners, may be sued in their firm name, if any," &c.

The effect of these words is much larger than if the words had been that two or more partners might be sued. The latter form of expression would indeed raise the question whether the defendants must not be partners at the time of action brought. But if the defendants be once liable as co-partners, the dissolution of the partnership does not take away nor alter that liability. Therefore after the dissolution of their partnership the defendants are still, within the words of the Rule, "*liable as co-partners*."

It does not seem, upon the best consideration I can give it, that the broad and natural meaning of the words of the rule is at all affected by the fact that the rules go on to specify modes of service of the summons, some of which are inapplicable to a case where the defendants are not partners at the commencement of the suit. I think that circumstance leaves the construction of the rule still open to the operation and meaning of its words, because these methods of service I refer to may be well taken to be intended by the rules for cases where the partnership is still in existence at the time of suit, so that this construction gives full effect to all the enactments of the rules.

And as I believe this is the true construction of the language, I also think it the construction which is most beneficial in practice.

I dismiss this motion, costs under the circumstances to be in the cause.

On appeal argued by the same counsel.

OSLER, J. A.—With the system of registration of co-partnerships, which prevails with us, I must say that I fail to see the usefulness or convenience in our practice of those rules of the Judicature Act which relate to suing co-partners in the firm name. On the contrary, as illustrated by the decided cases on the subject, they appear to me to be equally fruitful of expense, litigation, and delay. The occasions must be rare in which a plaintiff can have any difficulty in suing the individual members of the firm in the first instance, and in the case before me there seems no excuse for not having done so.

These, however, are not reasons for construing the rules differently from the corresponding English rules. I have read the cases cited to me, and although, as the learned Master in Chambers observes, different views have been expressed by the Judges who decided them, I think, if I may say so, that the weight of authority and reasoning supports the construction which he has adopted, and I do not see my way to differ from his conclusions.

The appeal is, therefore, dismissed.

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## GRAY V. ALEXANDER.

*Final interpleader order—Sheriff's costs.*

On appeal by a sheriff from the order of the Master in Chambers striking out so much of a former order as awarded the sheriff his costs of appearing on a motion made by the claimant, in an interpleader for a final order barring the execution creditor for default in giving security for costs, as directed by the order granting the interpleader.

*Held*, that the sheriff was properly served with notice of such motion, and was entitled to his costs thereof.

[October 20, 1884.—*Osler*, J. A.]

AN order directing the trial of an interpleader issue between the plaintiff, an execution creditor of the defendant and a claimant of the goods of the defendant, also directed both execution creditor and claimant to give security for the costs of the issue.

The execution creditor failing to give security within the time limited, the claimant moved for a final order barring the execution creditor, and gave the sheriff notice of the motion. The sheriff appeared upon the motion, and an order was made by the Master in Chambers barring the execution creditor with costs, and awarding the sheriff costs to be paid him by the claimant when recovered from the execution creditor. Subsequently the Master varied this order upon the application of the execution creditor, without notice to the sheriff, by striking out the portion which awarded the sheriff his costs.

From this amending order the sheriff now appealed to a Judge in Chambers.

*Clement*, for the sheriff.

*Shepley*, for the execution creditor.

*George Kerr*, for the claimant.

OSLER, J. A.—When an interpleader issue has been tried, and the successful party is applying merely for his costs and the final order usual in such cases, not interfering with any right or protection the sheriff is entitled to under the interpleader order or otherwise, there can be

no necessity to bring the latter before the Court on that motion. He should be served with the order made thereon, but beyond that he has, in ordinary cases, no interest in the proceedings, as the statute provides how his costs shall be recovered. If he is needlessly served with notice I cannot say that he may not be justified in attending upon it to see that no order is made to his prejudice, but in that case his costs should be paid by the party who brings him there. *O'Brien v. Bull*, 9 P. R. 494.

Here an issue was directed to be tried, and each party seems to have been ordered to give security for his opponent's and the sheriff's costs within a limited time, in default of doing which either party or the sheriff was to be at liberty to move to bar the party in default. The execution creditor made default and the claimant moved for and obtained an order to bar him of his claim. It is the sheriff's costs of the last application which are in question.

I think he was properly made a party to it. The order rescinds (in effect) so much of the interpleader order as directs the trial of an issue, and so the case is not within sections 15 and 16 of the Interpleader Act, which provide how the sheriff's costs of the original application are to be recovered, without his further intervention, when an issue has been tried.

The application now in question was merely a continuation of the original one. The sheriff might have made it, even without a special reservation, for his own protection as to his costs, and when made by either of the other parties to it he had the right to be present for the same purpose, a right which is admitted by the terms in which the order was drawn up, in directing his costs of both applications to be added to those of the claimant, and to be paid over to him by her when collected from the execution creditor. Such terms, though undoubtedly convenient and a saving of expense, could only, in the circumstances, be imposed by the consent of all parties, as the sheriff was entitled to a direct order for payment of his own costs.



I think the order is right as it was, and that the *ex parte* order or direction to amend it by striking out that clause which related to the sheriff's costs of the application must be rescinded, with costs of this motion, which I fix at \$5 to both parties. In taxing the sheriff's costs of the second application the taxing officer will, of course, consider whether any of such costs were unnecessarily incurred by him.

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DARLING ET AL. V. SMITH.

*Absconding Debtors' Act—Priorities of creditors.*

On the 25th of January, 1884, seven warrants of attachment at the instance of different plaintiffs were issued out of a Division Court against the goods of the defendant, an absconding debtor, and under them the bailiff seized certain goods. Subsequently and on the same day a writ of attachment was issued by the plaintiff in this suit against the defendant as an absconding debtor, and the goods seized by the bailiff were delivered up by him to the sheriff pursuant to sec. 16 of the Absconding Debtors' Act. Five other Division Court attachments and one County Court attachment were afterwards issued. Judgments were recovered by all the attaching creditors; executions were issued in the suits in the Superior and County Courts; and the clerk of the Division Court furnished the sheriff with a certified memorandum of the judgments in that Court, by virtue of which each creditor mentioned in it was entitled for the purpose of sharing in the proceeds to be treated as a plaintiff who had obtained judgment and sued out execution. Pending this suit an order was made for the sale of the goods attached under the writ, and the goods were sold, and the proceeds of the sale paid into Court.

Upon a motion for distribution of the moneys in Court the plaintiffs claimed payment of their costs of suit in priority to all other claims. It was ordered that the costs of issuing the plaintiffs' writ, and the fees and charges paid to the sheriff for executing it should be paid first out of the fund, because these costs and charges were necessarily incurred in seizing, recovering, and preserving the property, and that any fees which had been incurred in the Division Court in issuing the warrants of attachment on the 25th January, and seizing the property and holding it till it was delivered to the sheriff should also be paid out of the fund, and also the costs of the order directing the sheriff to sell, and the costs of this application, and that after payment of these charges the fund should be distributed ratably among the creditors.

[October 21, 1884.—Osler, J. A.]

THIS was a motion on behalf of the plaintiffs for the distribution of moneys in Court, and for a declaration that

the plaintiffs were entitled to priority for their costs of issuing and executing their writ of attachment.

The facts appear in the judgment.

*Holman*, for the motion.

*Aylesworth*, contra.

OSLER, J. A.—The facts appear to be that on the 25th January last, seven warrants of attachment at the instance of different plaintiffs, were issued out of the Third Division Court of the County of Huron, against the goods of one Smith, an absconding debtor, for sums amounting, in all, to \$257,71, besides costs. Under these warrants the bailiff seized certain goods. Subsequently, and on the same day, a writ of attachment was issued by the plaintiffs in this suit against Smith as an absconding debtor, and the goods seized by the bailiff were delivered up by him to the sheriff pursuant to section 16 of the Absconding Debtors' Act. Five other Division Court attachments were afterwards issued, amounting, in all, to \$379, and one County Court attachment, at the suit of the plaintiffs in this action, for \$229.78.

Judgments were recovered by all the attaching creditors, executions were issued in the suits in the Superior and County Courts, and pursuant to section 29 of the Absconding Debtors' Act, the clerk of the Division Court furnished the sheriff with a certified memorandum of the judgments in that Court, by virtue of which certificate each creditor mentioned in it is entitled, for the purpose of sharing in the proceeds, to be treated as a plaintiff who has obtained judgment and sued out execution. That, I think, is still the effect of section 29, which must be read in connection with sub-section 3, of section 4, 46 Vict. ch. 6. O.

Pending the suit an order was made at the instance of the plaintiffs, pursuant to section 4, ch. 6, 46 Vict., O., for the sale of the goods which had been attached under the writ. The order is not before me, and its terms do not appear from the affidavits. I assume the moneys now in

question are the proceeds of the sale, and that they were paid into Court under the order.

There can be no objection to an order being made for the ratable distribution of these moneys, although in strictness it would seem that the sheriff is the officer charged with that duty, and it appears that other moneys have been collected by his instructions under the writs which he must account for.

The plaintiffs in this suit, however, claim payment of their costs of suit in priority to all other claims. Their right to this priority is denied, and I do not think it exists at all events to the extent contended for.

Section 20, of the Absconding Debtors' Act, formerly enabled the Court or a Judge to direct that the costs of suing out and executing a writ of attachment should be satisfied in priority to an execution in a suit, the process in which had been served or executed before the suing out of the writ of attachment.

It was not considered reasonable that such an execution should sweep away the whole of the debtor's property without satisfying the costs which had been incurred in preserving it.

That section would have had no application to the present case, even if it had been still in force, but it was in fact repealed by 46 Vict. ch. 6, sec. 4, sub-s. 4; and sub-s. 3 of sec. 4 enacts that no writs of execution received by a sheriff after the receipt of a writ of attachment, shall take priority of the writ of attachment, but all writs of execution placed in the hands of the sheriff, or other officer, prior to the distribution of the proceeds of the effects attached, shall, *subject to any priority given for costs incurred under the first writ of attachment*, rank ratably in proportion to the sums actually due thereon, whether founded on a writ of attachment or not. The effect of this clause is to modify sections 28 and 30 of the Absconding Debtors' Act, which limited the ratable distribution of the effects attached to execution creditors who had also been attaching creditors, and also, where the proceeds were insuf-

ficient to pay all, restrained the right to share therein to those who had placed their writs or warrants of attachment in the sheriff's or bailiff's hands for execution within six months after the date of the first writ of attachment.

There is nothing in the Act as amended which expressly gives the first attaching creditor priority for his costs. Sub-sec. 3, of section 4, merely says that subject *to any priority given* for costs incurred under the first writ the distribution shall be ratable, &c.

As the facts are presented, aside from the sale under the order, the case is one which must often have arisen under the Act as it formerly stood.

There seems no reason why, when all are to share equally, the first attaching creditor should have any priority for the whole of his costs of suit as such. It can not be said that they are incurred in recovering and preserving the property attached, and I am not aware that he ever had any priority in respect of them under the former practice, except in the case provided for by the repealed section, which cannot again occur. I think, however, that the costs of issuing the writ, and the fees and charges paid to the sheriff for executing it, may properly form a first charge on the proceeds of the property, on the principle I have alluded to, namely, that they were necessarily incurred in seizing, recovering, and preserving it, and so also may any fees which have been incurred in the Division Court in issuing the warrants of attachment on the 25th January, and seizing the property and holding it until it was delivered to the sheriff. These fees and charges would, in my opinion, be properly deducted by the sheriff in making distribution had the moneys been in his hands, but they are on a different footing from the general costs of the action. Then there are the costs of the order which the plaintiff obtained under the recent Act, directing the sheriff to sell. Such costs for the same reason should be deducted from the fund which is to be distributed among the creditors, as the order must be taken to have been made in the interest of all. As to the costs of this appli-

cation, I assume that the Judge by whom the order for sale was made thought proper to direct the moneys to be paid into Court instead of to the sheriff. The application was therefore a necessary one not occasioned by any default of the plaintiffs, and the costs of all parties to it must also come out of the fund. If the parties cannot agree upon the distribution, there will be a reference to the Registrar for that purpose.

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### REGAN V. WATERS.

#### *Appeal—Surrogate Court—Scale of costs.*

Costs of an appeal from the Surrogate Court to the Court of Appeal should be taxed on the scale of the Court appealed from, as provided by Rule 28 of the Court of Appeal, and not on the scale of County Court appeals.

[October, 21, 1884.—*Osler, J.A.*]

AN issue was tried in the Surrogate Court of the county of Kent, and an appeal taken from that Court to the Court of Appeal was allowed with costs.

Mr. J. H. Thom, taxing officer, taxed the costs of the appeal upon the scale provided by the rules of the Court of Appeal for appeals from County Courts.

*Holman*, for the respondent, now appealed from the ruling of the taxing officer, contending that under Rule 28 of the Court of Appeal, the costs should be taxed on the scale of the Court appealed from.

*Davidson*, for the appellant, contra.

OSLER, J. A.—The 31st section of the Surrogate Courts Act, R. S. O. ch. 46, gives an appeal from any judgment of that Court to the Court of Appeal.

The rules of the Court of Appeal, afterwards promulgated in March 1878, do not specifically mention Surrogate Court appeals.



The appeal in this case was allowed with costs, and the question is upon what scale or tariff they should be taxed.

Rule 28 provides that the same fees and allowances shall be taxed in appeal as are allowed for similar services in the Court from which the appeal is brought.

Rule 29 limits counsel fees in appeal, in ordinary cases, to \$40 to senior, and \$20 to junior counsel, and in other cases to a maximum of \$80 and \$50.

*Re Osler*, 7 P. R. 80 ; 24 Gr. 529, decides that in the Surrogate Court, the fees in contentious and non-contentious business are by virtue of a manuscript rule of 31st August, 1858, to be the same as nearly as the case will allow as those payable in suits and proceedings in the County Courts.

The costs in the County Court appeals are, by Rule 51, directed to be taxed upon the same scale as formerly allowed on appeals to the Courts of Queen's Bench or Common Pleas. Rule 52 refers to appeal books "as well in Superior as in County Court appeals" apparently ignoring Surrogate Court appeals.

Insolvency appeals were specially provided for, and a tariff of fees fixed.

It would appear reasonable that the costs in appeals from the Surrogate Court should be taxed on the same scale as in County Court appeals. Nevertheless, that does not seem to have been provided for, and Rule 28, according to the best opinion I can form, must apply, and covers the case, as Mr. Holman contends. But for that rule, I should have felt at liberty to say that the costs should be fixed as upon a *quantum meruit*, and to direct that they should be taxed as upon a County Court appeal. This, however, I do not see my way to do.

The taxation must, therefore, proceed on the same principle as on appeals from the Superior Courts under Rule 28, viz: by taxing such fees and allowances as are allowed for similar services in the Court from which the appeal is brought, which again are as nearly as possible those taxable in the County Court.

The allowance for correspondence will also be regulated by Rule 28, and counsel fees by Rule 29.

It is probable that a rule of Court will shortly be made which will meet future cases of this kind.

Meantime, I can only say that it must be governed by the existing rules. I think it is hardly a case for costs.

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### DAWSON V. MOFFATT.

#### *Solicitor's lien for costs.*

By the terms of the judgment pronounced at the trial costs up to the hearing were to be paid to the plaintiff out of the fund in Court, a reference was directed to take the accounts, and further directions and subsequent costs were reserved.

The report of the officer to whom the reference was directed found the plaintiff indebted to the estate in a considerable amount, and a motion was made by the defendant Moffatt (pending an appeal from the report) to stay payment out of Court of the costs of the plaintiff up to the trial until after the hearing on further directions, in order that the amount found due to the estate by the plaintiff might be set off *pro tanto* against the costs awarded to the plaintiff.

*Held*, that the judgment pronounced at the trial gave the plaintiff and his solicitor a vested right to be paid out of the fund in Court prior to the defendant's equity to ask a set-off, and no set-off should be allowed to the prejudice of the solicitor's lien thus arising.

A solicitor's lien having been asserted at the bar during the argument, an affidavit proving it was allowed to be put in subsequently, following the suggestion of Strong, V. C., in *Webb v McArthur*, 4 Ch. Ch. R. 63.

[October 22, 1884.—*Boyd*, C.]

AN action was brought for an account in the nature of a partnership account.

By the terms of the judgment pronounced at the trial, costs up to the hearing were to be paid to the plaintiff out of the fund in Court, a reference was directed to take the accounts, and further directions and subsequent costs were reserved.

By the report of the officer to whom the reference was ordered, the plaintiff was found indebted to the estate in a considerable amount.

This was a motion by the defendant Moffatt (made pend-

ing an appeal from the report) to stay payment out of the fund in Court of the plaintiff's costs up to the trial until after the hearing on further directions, in order to admit of these costs being set off *pro tanto* against the amount found due by the report from the plaintiff to the estate.

*Wallace Nesbitt*, for the defendant Moffatt.

*Ruttan*, for the other defendants.

*Arnoldi*, for the plaintiff.

BOYD, C.—I am of opinion that no set-off should be allowed in this case to the prejudice of the solicitor's lien. That lien was asserted at the bar, and if there is any doubt about it I would allow an affidavit to be put in as suggested by Strong V. C., in *Webb v. McArthur*, 4 Ch. Ch. R. 63.

By the terms of the judgment, costs up to the hearing were to be paid to the plaintiff out of the fund in Court. That gave him and his solicitor a vested right to be paid out of that fund. The subsequent taking of the accounts, and the subsequent ascertainment, as is asserted, that the plaintiff owes the other parties, affords no ground for applying what is payable to him for costs to the reduction of this alleged debt. To do so would be to modify the judgment which intends a present payment to the plaintiff, and upon that the lien of the solicitor arises, which is prior to the defendant's equity to ask a set-off. If the plaintiff were a trustee, and indebted to a trust fund, it might be that the doctrine of set-off as applicable to costs payable to trustees would prevail against the solicitor's lien, as held in *Re Harrald, Wilde v. Walford*, 53 L. J. Ch. 505. But this is a case in the nature of a partnership, and more nearly analogous to the judgment of Hall, V. C., in *Hieron v. Hobson*, 47 L. J. Ch. 574.

I make no order, but give no costs.

## MARTENS V. BIRNEY.

*Motion for judgment—Notice—G. O. Chy. 418—Rule 407, O. J. A.*

G. O. Chy. 418 is controlled by the conflicting provisions of Rule 407 O. J. A., hence two clear days notice of motion for judgment under Rule 324 O. J. A. is sufficient.

[October 22, 1884.—*Boyd, C.*]

THIS was a motion for judgment to the Court by the plaintiff upon two clear days' notice of motion, the defendant having appeared, but having filed no defence.

*Cavell*, for the plaintiff.

*Masten*, for the defendant.

BOYD, C.—It is objected that this case cannot be heard on motion for judgment as against a defendant who has appeared without filing a defence, because seven days' notice of motion was not given under Chy. G. O. 418. *Exchange Bank v. Newell*, 9 P. R. 528, was cited in support of the objection, but that is not in point. It was there held that in appeals from the Master the length of notice was regulated by Chy. G. O. 642, which is expressly declared to be in force by Rule 3 of the Judicature Act. There is no such recognition of the existence of G. O. 418, and for this reason I think it is controlled by the conflicting provisions made in Rule 407. A motion for judgment is within this rule, as was held in *Parsons v. Harris*, 6 Ch. D. 694, and all the Judges of this division agreed in January, 1882, long before *Exchange Bank v. Newell* was decided, that the practice laid down in *Parsons v. Harris* was to be followed in this division: See *Burritt v. Murdock*, 9 P. R. 191, 2. Rule 4 of Rules of the High Court adopted 22nd August, 1881, and referred to in *MacLennan's* Judicature Act, p. 429 (2nd ed.,) does not affect time, but only provides that the distribution of business in each week shall be as nearly as possible the same as that directed by Chy. G. O. 416 and 593.

It was therefore regular to serve two clear days' notice of this motion, and the objection is overruled.

## HOLDEN V. SMITH.

*Judgment—Settling minutes—Rule 416 O. J. A.*

The entry of judgment, the minutes of which have been settled by a local registrar, does not preclude a party who at the time of such settling has given notice that he desires the minutes settled at Toronto, from afterwards obtaining a reference under Rule 416 O. J. A.

The Court will rather encourage (at all events for some time) the settling of judgments such as are not included in the forms at the head office, because of the well-understood phraseology in use by the two officers whose function it is to frame the terms of such judgments.

[October 22, 1884.—*Boyd, C.*]

A motion by the plaintiff to set aside an *ex parte* direction of the Chancellor, that the minutes of a judgment, pronounced at the trial at Chatham, should be settled by one of the judgment clerks at Toronto, under Rule 416 O. J. A., and a cross motion by the defendant to have the judgment settled by the Registrar at Toronto.

The facts appear in the judgment.

*E. Douglas Armour*, for the plaintiff.

*Langton*, for the defendant.

BOYD, C.—The points of practice argued on this motion are of some importance, and it does not appear to be yet definitely settled as to the proper method of procedure in like cases. The action was begun in the office at Chatham, and tried in that place before me, and was disposed of at the hearing. The local registrar noted my decision, and afterwards gave notice to settle the minutes of judgment. Both parties attended. The defendant disputed his jurisdiction, and then gave notice that he required the minutes to be settled at Toronto, and subject to this objection the local officer settled the minutes on the 25th June, and afterwards entered judgment on the 30th June, and issued execution.

On the 30th June, the defendant applied to me *ex parte*, and upon his request that the minutes should be settled by one of the judgment clerks, I gave a direction for that



purpose under Rule 416. It was not disclosed that the local officer had settled the minutes, nor that judgment had been entered. The former fact was known to the defendant and should have been mentioned to me; the latter fact was not known to him.

The plaintiff now moves to set aside my *ex parte* direction, and there is a cross-motion by defendant to have the judgment settled by the Registrar at Toronto.

I think that the intention of the Judicature Act was to decentralize much of the business formerly done exclusively at Toronto.

The practice known as "settling the minutes" still obtains in this Division, with such modifications as are necessarily introduced by the new procedure under that Act. By Rule 50, all proceedings to final judgment shall be carried on in the office from which the writ issues. That means up to and including the entry of final judgment in all cases and in whatever manner judgment is obtained, whether by trial or otherwise: See Rules 274, 275, 325, 328, 329, 419, 509, 516, 517, and Forms in Appendix (I). The local Registrar had power therefore to enter judgment and to settle the minutes as a preliminary thereto, subject, however, to the right of either party to have the settling referred to the judgment clerks at Toronto, under Rule 416. I do not see that there was any error in the plaintiff proceeding to execution as he did. There should be no consequential stay of proceedings, though one party desire to have the judgment settled at Toronto, as he might not prosecute his desire, and as such delay might operate prejudicially against the party entitled to execution. In the present case there was no very prompt action on the part of the defendant; he delays from the 25th to the 30th June, and if there was any special reason for having a stay of proceedings, that might have been obtained by an application for the purpose to a Judge.

But the entry of judgment does not preclude the party who stated his desire to have the minutes settled at Toronto from now obtaining that reference. The Court will rather encourage (at all events for some time) the settling of

judgments such as are not included in the forms at the head office, because of the well understood phraseology in use by the two officers whose special function it is to settle the frame and terms of such judgments. The intervention of these judgment clerks will secure that uniformity and certainty in the expression and meaning of judgments which is desirable for many reasons. Before the Judicature Act the practice was usually not to interfere with the decree after it had been entered. (See an exception, *Ex parte Pulbrook*, 17 W. R. 1075), and if a party wished to speak to the minutes, or (according to the more modern method) to move to vary the minutes, it had to be done before judgment was entered. That was because all was done at Toronto, and a Judge could be at once applied to, while yet the proceedings were in the shape of minutes. But that should be modified when the settling is done in an outer office, and delay must arise in putting Toronto agents in motion to bring the matter up under Rule 416. Because, as I read the rules, the order should be first to proceed before the local officer, then, if there is dissatisfaction, to have it referred to the judgment clerk, and then, if there is still dissatisfaction, to bring it before the Judge by way of appeal on the minutes as settled by the judgment clerk.

The matter may be prosecuted under my direction before one of the judgment clerks, and if no substantial variation is made in the judgment as settled by the local officer, the defendant should pay all costs occasioned by his motion. If there is substantial variation, the defendant should get his costs of and incident to that motion. I do not set aside my direction obtained *ex parte*, because the same result is arrived at as if I set it aside and granted the defendant's cross motion. The failure to disclose what had been done by the local officer was not intentional, and might well arise upon the undefined state of the practice, and for this reason I give the plaintiff the costs of his motion if no variation is made in the judgment; otherwise, no costs of that motion.

## IN RE GUY V. GRAND TRUNK RAILWAY COMPANY.

*Division Court—Jurisdiction of—Service—R. S. O. ch. 47, secs. 62, 244—Rules 8, 45, sec. 77, O. J. A.*

Service upon a defendant resident out of the jurisdiction is not a principle of practice within the meaning of sec. 244 of the Division Court Act, but a branch or a system of practice, or a means of relief which the procedure in Division Courts does not admit of being applied.

Neither R. S. O. ch. 47 sec. 244, nor Rules 8 and 45, O. J. A., make applicable to Division Courts the statutory rules and practice governing service on defendants out of the jurisdiction in actions in the Superior Courts.

The Grand Trunk Railway having their head office in Montreal, P. Q., are not defendants residing or carrying on business in this Province, within the meaning of R. S. O. ch. 47, sec. 62.

*Held*, that the service of the writ in this action on the station-master of the defendants at Bowmanville, was void, but the defendants having appeared at the trial, and after their objection to the jurisdiction had been overruled, having proceeded with the defence and cross-examined witnesses, &c., *Held*, that they had thereby precluded themselves from objecting to the jurisdiction.

[October 28, 1884.—Osler, J. A.]

MOTION for prohibition.

The facts appear in the judgment.

*Aylesworth*, for the motion.

*Holman*, contra.

OSLER, J. A.—The plaint was brought in the First Division Court of the United Counties of Northumberland and Durham, within the jurisdiction of which the cause of action arose.

The summons was served upon the local station agent of the defendants at Bowmanville. No notice disputing jurisdiction was given by the defendants until the trial of the cause, when counsel appeared on their behalf, as stated in an affidavit filed in support of the application, and did there and then object to the jurisdiction of the said Division Court to entertain the said suit, inasmuch as the defendants resided out of the Province of Ontario, having their head office in the City of Montreal, &c.

The learned Judge of the Division Court overruled the objection, and proceeded to try the case. The defend-

ants' counsel cross-examined the plaintiff's witnesses and addressed the jury. The amount of the claim was admitted, and a verdict and judgment was given for the plaintiff.

The defendants now move for a prohibition.

The jurisdiction of the Division Court over the person of defendants is limited by the 62nd sec. of ch. 47, R. S. O., which enacts that "Any suit cognizable in a Division Court may be entered and tried in the Court holden for the division in which the cause of action arose, or in which the defendant resides or carries on business at the time the action is brought, notwithstanding that the defendant at such time resides in a county or division different from the one in which the cause of action arose."

The action was brought in the division in which the cause of action arose, but these defendants, as has been frequently held, are a foreign corporation, and do not "reside or carry on business in this province," their head office or chief place of business not being situate therein: *Re Ahrens v. McGilligat*, 23 C. P. 171; *Westover v. Turner*, 26 C. P. 510. Sections 70 and 71 enact that the summons shall be served ten days at least before the return day thereof, and for longer fixed periods if the defendants do not reside in the county in which the action is brought.

Section 72. Service is to be personal if the demand exceeds \$8. If not exceeding that amount, it may be made on the defendant, or his wife, or servant, or grown person, being an inmate of his dwelling-house, &c.

Here there has been no service on the defendants. There is no authority for saying that service on their station-master or agent is one authorized by law in the case of an ordinary writ, though the recent Act, 47 Vict. ch. 9, sec. 2, sub-sec. 2, has now expressly provided for such a mode of service, where the foreign corporation are garnishees, as in *Ahrens v. McGilligat*, *supra*. But that leaves this case untouched.

The 14th section of the Act of 1880, which requires notice to be given where the jurisdiction of the Court is



disputed, even if it is not confined to garnishee suits, does not apply, because the notice mentioned therein is to be given by the defendant within eight days "after the service of the summons" on him, and the objection here is that there was not, and could not, be any such service.

In the *Ontario Glass Company v. Swartz*, 9 P. R. 252, it was held by Mr. Justice, now Chief Justice, Cameron that the process of Division Courts was of no effect beyond the limits of the province, and the execution of a judgment obtained against the defendant, an American citizen, was restrained by prohibition.

So here the defendants could not have been effectually served with the summons in Montreal or England, so as to found a judgment against them on such service. As Bramwell, B., observed, in *Mackereth v. The Glasgow and South Western R. W. Co.*, L. R. 8 Ex. 149, 151: "If the service could not have been effected on an individual, I can see no reason why a corporation should be in a different position."

In that case the reason is pointed out why the service in *Newby v. Von Oppen and The Colts Patent Firearms Manufacturing Co.*, L. R. 7 Q. B. 293, was held good, viz that the foreign defendant corporation, in the peculiar circumstances of the case, resided or were domiciled at the place in England where they offered their goods for sale, and the service was made on their chief officer or manager there. I am therefore clearly of opinion that these defendants cannot be compelled to appear to a summons issued against them in an ordinary action, because no means have been provided of effecting service upon them.

The machinery of the Court has only been made operative in the case of persons or corporations resident within the province (except in the instance specially provided for); and I think that neither section 244, R. S. O. ch. 47, or Rules 8 and 45 of the rules of the Judicature Act, or section 77 of that Act, can give jurisdiction by making applicable to these Courts the statu-



tory rules and practice governing service on defendants, out of the jurisdiction in actions in the Superior Court: *Pryor v. The City Offices Co.*, 10 Q. B. D. 504; *Clarke v. Macdonald*, 4 O. R. 310.

Service upon a defendant resident out of the jurisdiction is not a principle of practice, but a branch or system of practice or means of relief, redress, or remedy which the procedure in the Division Courts, does not admit of being applied.

I am, however, of opinion that in this case the defendants have precluded themselves from objecting to the jurisdiction, and that prohibition ought to be refused.

The precise nature of their objection must be borne in mind. The Court had jurisdiction over the cause of action as to its locality, nature, and amount. The only difficulty was the absence of power to compel the appearance of the defendants. The summons was regular, and it might be that the defendants would be well content to appear and proceed to trial in the Division Court on the score of convenience, expense, or other reasons. They might waive service altogether.

If they do appear, they do all that is necessary to give jurisdiction, and there is no want of jurisdiction on the face of the proceedings. What was done here? Instead of moving for prohibition when the summons came to their notice, or retiring from the trial when the Judge overruled their objection, they proceeded with the trial of the cause, cross-examining the plaintiff's witnesses, addressing the jury, and admitting the amount of the plaintiff's claim, taking in short the chance of a favourable verdict.

Their complaint is that they could not have been compelled to appear. But though they did so complain at the trial, they did what they could not have done without appearing: they defended the action.

In *Forbes et al. v. Smith*, 10 Ex. 717, a British subject, residing in France, had been served with a writ, to which he need not have appeared, and on which the plaintiffs could not have obtained leave to proceed further. Never-

theless, he did appear, and then moved to set aside the writ. It was held that by appearing he had voluntarily subjected himself to the jurisdiction of the Court. The principle of practice applied in that case may well be adopted and applied here. To use the language of Wilson, C. J., in *Ward v. Vance*, 3 P. R. 130, at p. 138: "The effect and substance of the objection is, that no service has been made at all, and yet there is the anomaly of the party being seen in Court, and personally making an excuse for not being there," and, as I have said, defending the action besides.

In *Beaudry v. Mayor of Montreal*, 11 Moo. P. C. 400, 426, the Court said that mere respectful acquiescence or submission to the rules of the Court does not amount to a waiver of an objection to the jurisdiction. Here there was much more than that.

I refer to *Mayor of London v. Cox*, L. R. 2 H. L. 239, and to *Robertson v. Cornwell*, 7 P. R. 297. In the latter case prohibition was granted after trial, and after the defendant had moved for a new trial, as the cause was one over which the Court had no jurisdiction.

*Motion dismissed, with costs.*

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## MCMILLAN V. WANSBOROUGH.

*Examination—Witness—Pending motion—G. O. Chy. 266—Rule 285 O.J.A.*

Upon a motion, pending, witnesses may still by G. O. Chy. 266 be examined under a subpoena and appointment.

That order has not been superseded by Rule 285 O. J. A.

*Township of Monaghan v. Dobbin*, 2 C. L. T. 260, overruled.

[June 16, 1884.—*Ferguson*, J.]

AN appeal by the defendant from the decision of the Taxing Officer that the plaintiff should be allowed the costs of examining witnesses under a subpoena, and appointment upon a motion to stay the operation of an injunction.

*Masten*, for the appeal, cited *Township of Monaghan v. Dobbin*, 2 C. L. T. 260; *Beaver v. Boardman*, 9 P. R. 239, and contended that Chy. G. O. 266 had been superseded by Rule 285 O. J. A.

*Hoyles*, contra, cited *Raymond v. Tapson*, 22 Ch. D. 431; *Morgan* on Costs, 480.

FERGUSON, J.—It has been decided in England by Mr Justice Kay, and in appeal by the Court of Appeal, that the English Order 37, Rule 4, which is the same as our Rule 285, has not the effect of superseding sec. 41 of 15 & 16 Vic. Cap. 86, from which our Chy. G. O. 266 was taken; and I think that I must hold that our Order 266 is in force. The plaintiff had the right under this order to issue the subpoena and examine the witnesses: *Raymond v. Tapson*, 22 Ch. Div. 431. As to the amount, I think I should not interfere with what the Taxing Officer has done, and I am of the opinion that the appeal should be dismissed, but as there was a decision in Chambers by Mr. Dalton (*Monaghan v. Dobbin*, 2 C. L. T. 260,) before that case, there will be no costs.

*Appeal dismissed, without costs.*

## OGDEN V. CRAIG.

*Interpleader—Sheriff.*

A mortgagee under a mortgage which from certain irregularities in it, was void against subsequent mortgagees or purchasers in good faith for value, took possession of the chattels mentioned in it, and secreted them.

An execution was afterwards issued, and the sheriff endeavoured but was unable to seize the goods. It was alleged, and not contradicted, that the execution creditor and defendant were colluding to defeat the mortgagee's claim.

*Held*, that the sheriff was not entitled to an interpleader.

Where a sheriff intends to take goods under an execution the Court has jurisdiction to grant him an interpleader, but this jurisdiction will be rarely exercised, and never unless it is shown that the property or possession in the goods is in the defendant.

[June 20, 1884.—*The Master in Chambers.*]

[July 2, 1884.—*Rose, J.*]

AN interpleader application made on behalf of the sheriff of Bruce.

The facts appear in the judgments.

*Allan Cassels*, for the sheriff.

*H. J. Scott*, Q. C., for the execution creditor.

*Clement*, for the claimant.

THE MASTER IN CHAMBERS.—The purpose of an interpleader is to indemnify the sheriff as to property he has seized, or can seize, or could have seized. As to property in neither of these conditions, the sheriff does not want an indemnity; it is not necessary for him though he may have *intended* to seize it.

The sheriff here cannot seize the property because it has gone into the hands of a party who refuses to produce it, who has it, and announces that he claims it in his own right, and he refuses to let the sheriff know where it is. He asserts his right under a mortgage from the defendant, his right having been perfected by possession before the plaintiff had commenced the suit in which the *fi. fa.* has issued.

It would seem to me an alarming thing to allow of actions in such cases by a sheriff's claim to interpleader, for I cannot gauge the extent of it. The sheriff can seize a promissory note under an execution. Failing to get hold of it, because the judgment debtor had endorsed it to a stranger who claimed to hold it for value, as his own property, and refuses to produce it to the sheriff, is the sheriff to inaugurate an interpleader suit as to the right of the holder, treating the endorsement as a fraud upon creditors, upon an averment that he *intended* to seize the note?

The sheriff would not be liable to the creditor for not seizing, nor would he be here. Therefore the sheriff wants no indemnity.

So to grant it in this case would seem to carry the interpleader remedy far beyond its proper use. The sheriff is not in danger.

On appeal from the judgment of the Master in Chambers, argued by the same counsel.

ROSE, J.—Mr. *Cassels*, for the appellant, urged upon me

1. That the order should have been granted, as the sheriff intended to seize, and therefore it was not necessary that he should have been in possession at the time of the application.

2. That in any event he should not have been ordered to pay the costs.

Mr. Clement urged that the sheriff was not in possession, could not obtain possession, that the goods were not the defendant's, but the claimant's, and at the date of issue of execution and placing same in the hands of the sheriff, were in the possession of the claimant and not of the defendant, and therefore the sheriff was not entitled to the protection of the statute.

Mr. Scott, for the execution creditor, was content that the application of the sheriff should be granted. The reason for this will appear when I state the facts.



It appears that the execution debtor, James Thomas Craig, who was a photographer, being indebted to D. James Bain, the claimant, in the sum of \$189.65, gave him a chattel mortgage on the goods in question, dated the 1st November, 1883. There is no date fixed for the payment of the principal, but the interest was made payable half-yearly on the first days of May and November. The *bona fides* of this mortgage is not impeached, but it appears not to have been filed within the five days, and the affidavit of *bona fides* is imperfect, the word "him" being omitted from the ending of the last line. The mortgage was thus void as against "creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith for valuable consideration."

The claimant, by his bailiff, seized the goods and chattels covered by the mortgage on the 2nd of May, 1884, and at the time of the issue of the writ of execution they were in the possession of the claimant.

On the 23rd of April, 1884, the mortgagor, Craig, conveyed his equity of redemption in the goods to Ogden, who, on the 2nd of May, served a notice on Bain, claiming "to be the owner of the goods, chattels, and effects" (setting them out) and adding, "and I hereby claim the same under a bill of sale made by J. T. Craig to me dated the 23rd of April last, and this I will sustain and prove."

This notice was served after Bain had seized under his mortgage.

It is said in one of the affidavits, filed on behalf of the claimant, that the mortgagors, Craig, and Ogden, thought they could defeat Bain's mortgage by this action, as it was not in form or filed according to the statute.

It is further said that, being advised that such an attempt would be futile, Ogden brought an action against Craig for various sums of money lent, including the money which formed the consideration for the bill of sale. It is stated that all the judgment debt, except about \$14, formed the consideration for the bill of sale, and that the \$14 were paid since the giving of the bill of sale.

The writ of summons in such action appears to have been issued on the 12th of May, 1884, and the obtaining of judgment was expedited by Craig so that judgment was obtained and execution placed in the hands of the sheriff on the 15th of the same month.

It is further stated that Craig and Ogden are acting together in collusion to defeat Bain's claim under his mortgage.

No affidavit is filed by either Craig or Ogden denying these adverse statements, so that they are uncontradicted.

The affidavit on which the application is founded is made by one William Kerny, who is styled "sheriff's officer." What office he holds does not appear.

He states that under the writ of execution and warrant granted thereon in the suit of *Ogden v. Craig* he did, on the 19th of May, 1884, "*endeavour to take possession of certain goods and chattels which had been in the shop of the above named defendant \* \* and which goods and chattels \* \* had been mortgaged to one D. James Bain, the claimant, and had been removed by him and his bailiff, and secreted by them since the 15th day of May, 1884, the date of the receipt of the said writ of execution by the said sheriff, as I am informed and verily believe.*" If by this he means that the goods had been removed after the receipt of the writ, he is evidently in error; but probably he meant that they had been secreted *ever since* the receipt of the writ.

He adds, "I went to Paisley on the said 19th day of May, and tried to find said goods, *but could not find them*, and there saw the said claimant, who told me the goods were where neither I nor anyone else could find them, and that he claimed them under a chattel mortgage from defendant to him. I demanded said goods from said D. James Bain, and from his bailiff, &c."

This officer further deposes "that this application is made to this honourable Court solely on behalf of the said sheriff, and for his indemnity only, and I do not, nor does the said sheriff, in any manner collude with the said D. James Bain, or with the above named plaintiff."

Had it not been for this clause I would have clearly come to the conclusion, that the application was made at the instance and on the behalf of the execution creditor Ogden.

There is no statement in the affidavit "that the property seized was the property of the defendant, or that the sheriff believed it was his property." The absence of these words was held in *Day v. Carr*, 7 Ex. 883, to prevent any ground existing for the rule.

Since the argument Mr. Dalton has favoured me with his reasons for his judgment. I am clearly of the opinion he has arrived at the correct result. I have no doubt that Mr. Cassels is correct in his contention that the Court has jurisdiction to make the order "where the goods are taken or *intended* to be taken in execution." The cases cited by him of *Lea v. Rossi*, 11 Ex. 13; *Day v. Carr*, supra.; *Holton v. Guntrip*, 3 M. & W. 145, collected in *Cababé* on Interpleader and Attachment of Debts, p. 24, make this clear; but they also make it clear that this jurisdiction will be rarely exercised, and where the material before the Court does not show or even suggest the property or possession in the goods to be in the defendant, it seems to me *Day v. Carr* and *Holton v. Guntrip* are clear authorities against the sheriff's right to have the relief. The sheriff has no right under a writ against A. to take the goods of B., and *a fortiori* he has no right under such a writ to take the goods of B. out of the possession of B.

In *Day v. Carr*, Platt, B., styles such an action "a contempt of the officer abusing the process of the Court, by seizing the goods of one person under a writ against another."

Then it is clear that in this case whatever property the defendant had in the goods as mortgagor, *i. e.*, in the equity of redemption, he had conveyed to this very plaintiff.

Again, the affidavit of the sheriff's officer shews that he never had the goods and could not obtain them. How is he to execute the process of the Court? If he has been so neglectful of his duty as to render himself liable to an action by Ogden, and this is hardly suggested, and certainly

no ground is shewn for such contention, then he is not entitled to come to the Court for relief ; and if he has not neglected his duty, and I do not see that he has, he does not require the protection of the Court.

The right of Bain to the goods as against the mortgagor is, of course, perfectly clear notwithstanding any defect in the affidavit or non-compliance with the requirements of the Act respecting bills of sale. Ogden has, it is said, been advised, and probably well advised, that for want of "good faith" he had no ground to stand upon, with respect to his bill of sale, to attack the mortgage, and certainly, the irregularity in the affidavit and filing of the mortgage cannot be taken advantage of by him when the mortgagee took possession prior to the lodging of the writ of execution in the sheriff's hands : See *Robins v. Clark et al.*, 45 U. C. R. 362.

I am of the opinion that the appeal must be dismissed, with costs. As the sheriff has appealed he must, of course, pay the costs. I see nothing in the papers before me to lead me to desire to interfere with the Master's discretion as to costs in his order dismissing the application.

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## CLARKE V. RAMA TIMBER TRANSPORT CO. (LIMITED).

*Security for costs.*

Where several parties suffer damage from the acts of the defendant, and they agree among themselves to share the costs of a test action by one of them to establish his rights, security for costs will not be ordered even though such a plaintiff is insolvent.

*Clark v. St. Catharines*, ante p. 205, distinguished.

[September 13, 1884. — *The Master in Chambers*.]

[September 19, 1884. — *Osler*, J. A.]

THIS application was made on the part of the defendants for an order requiring the plaintiff to give security for costs, on the ground that the plaintiff was merely a nominal plaintiff and suing for the benefit of others, and was a person without means.

The affidavits in support of the motion shewed that the claim sued for was only one of several claims made by parties who had settled on the shores of Lake St. John for alleged damage caused by the flooding in the spring by the waters of the lake, which, it was claimed by the plaintiff, were unduly raised by reason of the canal of the defendants connecting the Black River with Lake St. John: that the plaintiff was merely the nominal plaintiff, and was put forward by, and would not have brought the suit or taken proceedings therein but at the instigation of, other persons having claims as aforesaid, and who were men of substantial means, but did not desire to run any risk of having to pay costs in the event of this action, which was really a test case, being decided adversely; and that the deponents were informed and believe that all the parties having claims as aforesaid had entered into a written agreement to share among them the immediate costs necessary to carry on this action as a test case, and that they had selected the plaintiff in such test case as being a man of no means.

The affidavits of the plaintiff shewed that he believed himself to be of sufficient means to enable the defendants



to recover their costs from him, if successful; that no one was interested in the result of this action other than himself, except in so far as it might determine the liability of the defendants to indemnify others who had been injured by the same wrongful acts which were complained of in this action; and that this action had been brought up from the Division Court by writ of *certiorari* against the will of the plaintiff.

*Arnoldi*, in support of motion.

*Holman*, contra.

MR. DALTON, Q. C., MASTER IN CHAMBERS.—This is not a class suit—which is one of several features which distinguish it from *Clark v. St. Catharines*, 10 P. R. 205. The plaintiff is suing for his own cause of action, and he asserts certainly substantial damage. No one but himself will be interested in anything he may recover from the defendants. But it is asserted, and is no doubt the fact, that there are several other parties who are interested in establishing the liability of the defendants for the overflowing of which the plaintiff complains. That is, if the plaintiff can recover for the overflowing of his land, then these other parties can recover for the overflowing of their respective lots on the same occasion. In no sense are these parties interested in the plaintiff's suit, but as to the indirect consequence of the plaintiff's success or failure, that it may shew them whether they can sue the defendants.

These parties have agreed to contribute to the plaintiff's costs of this suit, and they call it a test suit.

The plaintiff is a lessee of the land he cultivates, but he swears that he is possessed of enough to enable the defendants to recover their costs if they succeed against him. The plaintiff did bring his suit in the Division Court, and it was moved into the Common Pleas Division by *certiorari*. Of course in the Division Court the costs would be only the expenses for witnesses.

As the plaintiff is suing to enforce his own right, and no

one is interested with him in what he may recover, I think it is not a ground for making him give security for costs—even were he, as is alleged, insolvent, which I think he is not—that other parties indirectly interested as I have described in the result of his suit, have agreed to contribute to the costs. It is his suit to enforce his own right.

I do not understand that this plaintiff is merely put forward by these other parties for their own purposes, though they may be interested in the indirect consequences of his action. He is an active litigant on his own behalf.

On appeal argued by the same counsel on the 19th September, 1884.

OSLER, J. A., affirmed the foregoing decision.

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### REGINA V. BASSETT.

*Conviction—Vagrant Act, 32 & 33 Vic. ch. 28 D.*

The defendant registered his name and address at the American Hotel, Toronto, and on the same day was arrested at the Union Railway Station, having been pointed out to the police by some of the railways' officials as a suspicious character. On his person were found two cheques one for \$700 the other for \$900, which were sworn to be such as are used by "confidence men," a mileage ticket nearly used up in favor of another person, and \$8 in cash. He offered no explanation of the cheques or the ticket, and gave no information about himself.

*Held*, that the Vagrant Act did not warrant his arrest, much less his conviction.

Before a person can be convicted of being a vagrant of the first-class named in the Act ("All idle persons who not having visible means of maintaining themselves live without employment") he must have acquired in some degree a character which brings him within it as an idle person, who having no visible means of maintaining himself, *i. e.* not "paying his way or being apparently able to do so, yet lives without employment.

[October 29, 1884.—*Oster*, J. A.]

A writ of *habeas corpus* was issued, directed to the warden of the Central Prison, commanding him to bring up the body of Francis Bassett, a prisoner confined therein. A writ of *certiorari* was also issued, directed to the Police

Magistrate of the city of Toronto, for the purpose of bringing up the information, depositions, and conviction, on which the warrant of commitment of the prisoner was founded.

These writs and the returns thereto, with the warrant, conviction, depositions, &c., having been filed :

*Morson*, moved before Osler, J. A., for the prisoner's discharge.

*Cartwright*, shewed cause for the Attorney-General.

The facts appear in the judgment.

OSLER, J. A.—The papers before me disclose the following facts :

The prisoner was arrested on the 11th July last on the information of John Hodgins, a police constable, on a charge of vagrancy, the allegation in the information being that he was on the 11th January, 1884, at the city of Toronto, "an idle person who, not having visible means of maintaining himself, lived without employment and then was a vagrant, loose, idle, and disorderly person, within the meaning of the Act respecting vagrants."

On the 12th July he was brought up, pleaded not guilty, and was remanded (no evidence being taken) until the 18th July. On that day the evidence of one *Foster* was taken. He said he knew prisoner, and had seen him at the Union Station on the 11th inst. He wanted to check a trunk for a young lady to Caldwell. He (witness) found that she was going to Bracebridge. Prisoner was afterwards shewing an old lady and gentleman on a train, Having suspicions of him he notified the police. James Price, conductor on Grand Trunk Railway, said the brakeman cautioned him about the prisoner. On the 11th went into the smoking car, and asked the parties there if he was with them. They said no. Asked them to take the next car. Prisoner followed them. Prisoner got off at Brock street, and said to conductor, "could I not live and let live."

Owen Maloney, brakesman, on 11th July, between the Union Station and Brock street, saw prisoner talking to two parties, *suspected him*, and told the conductor. This was about noon.

John Hodgins arrested prisoner at the Union Station between 7 and 8 p.m.; asked him his business. He refused to give a satisfactory account of himself. Said he was just looking around. Arrested him as a vagrant. Found cheques produced on him. *Such cheques are used by confidence men.*

These cheques were : one for \$1,700, drawn by Gunn & Co., on the London Branch of the Bank of Commerce, in favour of Walter H. Stewart or bearer, marked cancelled, and on the back in pencil "valueless no account."

No. 2 for \$900 by Samuel Chump, in favour of Francis Gleason, dated the 13th June, 1884, on the Bank of Toronto, Montreal. This was marked "certified."

The prisoner then seems to have been remanded till the 25th August; again until the 31st; and again until the 1st September, on which day further evidence was taken.

Hodgins was recalled, and said: When I arrested prisoner he had \$8.05 on him and a railway ticket on some U. S. railway. It appeared to be a 1,000 miles mileage ticket in favour of C. Asquith (nearly used up.) Prisoner said he was stopping at the American hotel. *The cheques produced are such as are used by confidence men to defraud travellers.* (This was objected to.)

Mr. Prince, clerk in the American hotel, said that the prisoner was at the hotel on the 11th July. He is registered there Francis Bassett, Fort Wayne, Indiana. He had not left when he was arrested; don't think he had any baggage. He *most likely* had some, as he had the check produced.

Thomas W. Jones had never seen the prisoner.

George Parkes, clerk in the Bank of Commerce, proved there was no such account as that of Gunn, Roper & Co. in the bank books.

The prisoner was then, after a detention of *upwards of*

*six weeks on remand*, convicted of the offence laid in the information. and sentenced to be imprisoned in the Central Prison (there to be kept at hard labor), for the space of five months.

I have set forth fully the depositions upon which the conviction is founded, as it was argued, and I agree that they are calculated to excite doubts of the perfect honesty of the prisoner's means of gaining a livelihood, looking at the bank cheques and mileage ticket, and the fact that he has not vouchsafed any explanations of them, or information about himself, though unquestionably not bound to do so. But I also desire to point out that much is stated in the depositions which is not evidence; such as statements of suspicion, statements that the cheques were such as are used by confidence men, hearsay statements, &c.

Prisoners charged with an offence meriting and receiving a severer sentence than is commonly imposed for a first conviction for larceny, or even more serious offences, are entitled to insist that such offence shall be proved at least as precisely and by evidence of as high a degree in a Police Court as in an Assize Court.

The Vagrant Act, 32-33 Vic. ch. 28, D., does not warrant an arrest, much less a conviction, on mere suspicion of dishonest intentions or suspicion of vagrancy. It strikes at several described classes of persons, and declares that individuals coming within any of those classes shall be deemed vagrants. The first class is: "All idle persons who, not having visible means of maintaining themselves, live without employment."

How is a person shewn to belong to that class? That he is unknown does not prove it, quite the reverse; that he is without employment on one day or more, does not prove it; that he has no visible means of maintaining himself, does not alone prove it. He may be an idle man without profession or known occupation, and yet may maintain and pay for himself at a lodging house or hotel, without any imputation of vagrancy. He is not, if unknown, required at his peril to give a satisfactory, or any account



of himself. The Act only requires that in the case of prostitutes or night walkers, &c., or persons frequenting houses of ill fame : *Regina v. Levecque*, 30 U. C. R. 509.

In my opinion before a person can be convicted of being a vagrant of this class he must have acquired in some degree a *character* which brings him within it, as an *idle* person who having no visible means of maintaining himself, *i. e.*, not "paying his way," or being apparently able to do so, yet *lives*, without employment.

The prisoner is one against whom no actual overt, improper, or illegal act was charged by any one or proved. He was not apparently known to any one in the city before the 11th July, on which day he registered his name and address at the hotel, where he was still a guest at the time of his arrest on the evening of that day, and from his possession of a check was presumably the owner of luggage of some description. He was seen twice at the railway station on the same day, no complaint being made about him by any one, though he was, and perhaps justly, regarded with suspicion by the railway officials; and when arrested he was possessed of \$8.

It is not easy to understand how a man living at an hotel for a single day, not in default there, and with money on his person, can be said to have no visible means of maintaining himself. So far as anything appeared or was known to the police at the time of this man's arrest, there was nothing which would not have applied quite as forcibly to many other unknown casual visitors to the city, or to persons who had resided, it may be, for months at hotels here, living upon their private means invisible to any one but themselves and their creditors.

In the case of *In re Jones*, 7 Ex. 586, speaking of a conviction under the Vagrant Act, 5 Geo. IV. ch. 83, s. 4 (Imp.), Pollock, C. B., said : "Where the liberty of the subject is concerned, with reference to a statute so highly penal, we are bound to take care that the important but very stringent power entrusted to magistrates is not exceeded."

I am quite sensible of the value of the provisions of the

Vagrant Act as a means of preventing crime, but they were not intended to authorize such an interference with liberty as has occurred in the present case, or to introduce a system of preventive justice administered upon suspicion, in lieu of defined accusation supported by competent proof.

I think there is not the least evidence to support the conviction, and that the prisoner is entitled to his discharge.

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ANGLO AMERICAN CASINGS COMPANY (LIMITED) V.  
ROWLIN.

*Security for costs—Meritorious defence.*

Security for costs will not be ordered when the defendant has admitted the cause of action; and it is not essential that the admission should be in the action, on the pleadings, or in any technical form.

The plaintiff swore that there was no defence on the merits, and produced a letter received from the defendant before action, promising to pay the claim sued on.

*Held*, that this uncontradicted or explained warranted the conclusion that there was no defence.

*Bank of Nova Scotia v. La Roche*, 9 P. R. 503, not followed.

[October 29, 1884.—*Boyd, C.*]

AN appeal by the defendant from the order of the Local Master at Hamilton, rescinding a præcipe order for security for costs.

*Watson*, for the appeal.

*William Bell*, contra.

BOYD, C.—In *Winterfield v. Bradnum*, 3 Q. B. D. 324, the Court of Appeal held that when the plaintiff's cause of action is admitted upon the pleadings, no order for security for costs should be granted to the defendant, though he counterclaimed in respect of an independent transaction. That case was extended in *Doer v. Rand*, 10 P. R. 166, to an admission which was obtained from the defendant by

means of an examination in the action. And this line of decisions was still further extended in *De St. Martin v. Davis*, 28 Solrs. J. 392; W.N. 1884, p. 86, to a case where the defendants had written a letter to the plaintiff, admitting that they owed him the amount claimed, and saying that they were not able to meet their liabilities. This is a decision of Field, J., and is the more noticeable because he had ordered security in the first instance in *Winterfield v. Bradnum*: see *Mapleson v. Masini*, 5 Q. B. D. 147, I take the principle of these decisions to be that it is not essential that the admission should be in the action, or in any technical shape. It is enough if it is fairly to be inferred upon the evidence before the Court that there is an admission of liability. Upon that the Judge is at liberty to exercise his discretion for or against granting or upholding the order for security. The cases cited shew that the Judges have exercised such a discretion under that rule of the English Act, which corresponds to our Rule 429, and I do not think that Rule 431 is to be read independently of Rule 429 in any such sense as to fetter the Judge's discretion when the *ex parte* order obtained under that later rule is moved against by the plaintiffs.

The *Bank of Nova Scotia v. La Roche*, 9 P. R. 503, is at variance with the above cited cases, because it there appeared that the defendant had admitted his liability in an affidavit made by the plaintiffs, which was not contradicted. The attention of Mr. Justice Cameron does not appear to have been called to *Winterfield v. Bradnum*, *supra*, and he proceeds upon the authority of *Edinburgh and Leith R. W. Co. v. Dawson*, 7 Dowl. 573, in which Mr. Justice Patteson says that even if it appears that the defendant has no defence upon the merits, he has still a right to compel the plaintiffs to give security. That correctly represents the practice in the days before the Judicature Act, but it is totally opposed to the authorities decided since then, which are now to be followed under the Ontario Act.

In *De St. Martin v. Davis*, when the order for security

was appealed from there was a summons pending for judgment under the rule corresponding to our Rule 80. In the present case, the materials placed before the Local Master, to obtain the discharge of the order for security, were such as would have warranted the order for judgment on a specially endorsed writ.

The plaintiffs here specially endorse the writ, and claim against the defendant as acceptor of a bill of exchange for \$750, dated July 21st, 1884, drawn by plaintiffs on defendant, and accepted by him on July 24th, 1884, payable 60 days after sight. The action was begun on September 28th, and it appearing on the face of the writ that the plaintiffs resided out of the jurisdiction, a præcipe order for security was taken out on October 4th. A summons was then obtained by the plaintiffs to set aside this order, on the ground that the defendant had no defence, and the usual affidavit was filed necessary to get judgment under Rule 80, which also verified a letter written by the defendants to the general manager of the plaintiffs, dated at Hamilton, 22nd September, 1884, in which are these passages. "My note for \$750, in your favour, is due on the 24th. You will kindly give me another month \* \* when it will be paid in full." Though it is called a note, the date and the amount correspond, and taken with the affidavit which is unanswered, the moral certainty is that the defendant admits the liability, and has no defence to offer.

The more modern cases as to what is a sufficient admission to justify the Court in ordering money to be paid into Court, in the hands of a trustee, or other person accountable therefor, have a bearing on the decision I now make. In *Freeman v. Cox*, 8 Ch. D. 148, a notice of motion was served upon the defendant, an executor, for payment into Court of money belonging to the estate, which it was shewn by affidavit that he had received. The defendant did not appear, and Sir George Jessel held that the defendant not having disputed the affidavit, there was a sufficient admission that the money was in his hands, and he ordered him to pay it into Court on the ground that he did not dis-

pute the debt. Other cases are referred to by Mr. Justice Chitty, in *Hampden v. Wallis*, 32 W. R. 977, which go to establish that one mode of admission is just as good as another. Here this defendant's failure to answer the affidavit of the plaintiffs and to explain the admissions in his letter, are sufficient to warrant the conclusion that the reason for awarding security for the defendant's costs does not apply here, because he has no defence, and the plaintiffs are entitled to judgment.

I see no good reason why, in cases like this, the plaintiffs may not move *uno flatu*, and upon the same materials, to vacate the order for security and to sign judgment.

I agree, therefore, with the Master's conclusion, but as it is a new procedure, and the defendant may have abstained from answering the affidavit on an erroneous idea of the practice, I incline to rescind the order for security without prejudice to the defendant making another application for security if it should appear that he has a defence, but this will not affect the costs, which I make costs in the cause to the plaintiffs in any event.

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## REGINA V. NUNN.

*By-law—Conviction—Proviso and Exception—Recognizance—Certiorari.*

47 Vic. (O.) ch. 32, sec. 13, sub-sec. 12 enacts that by-laws may be passed "for regulating or preventing the ringing of bells, blowing of horns, shouting and other unusual noises, or noises calculated to disturb the inhabitants," &c.

Section 2 of by-law No. 179 of the City of London, passed under that Act, is as follows: "No person shall, in any of the streets, or in the market place of the City of London, blow any horn, ring any bell, beat any drum, play any flute, pipe, or other musical instrument, or shout or make, or assist in making, any unusual noise, or noise calculated to disturb the inhabitants of the said City."

"Provided always, that nothing herein contained shall prevent the playing of musical instruments by any military band of Her Majesty's regular army, or any branch thereof, or of any militia corps lawfully organized under the laws of Canada.

The prisoner was convicted under the by-law of beating a drum on a public street in the City of London.

*Held*, that the by-law so far as it sought to prohibit the beating of drums simply, without evidence of the noise being unusual, or calculated to disturb was *ultra vires*, and invalid, and that the refusal to receive evidence on the prisoner's behalf was a valid ground for her discharge.

*Held*, also, that the above proviso was not an exception that must be negatived in either the commitment or conviction.

*Held*, also, that on the return of a writ of *certiorari* a recognizance is unnecessary.

[July 23, 1884.—*Rose, J.*]

A motion for the discharge of the defendant from custody.

The facts appear in the judgment.

*McMichael*, Q. C., and *R. M. Meredith*, for the motion.

*Osler*, Q. C., and *T. G. Meredith*, contra.

ROSE, J.—This is a motion for discharge of prisoner on return of writs of *habeas corpus*, and *certiorari*, issued under the provisions of sec. 8 cap. 70 R. S. O.

On motion for leave to file returns, Mr. *Osler* objected to the return to the writ of *certiorari* being filed, as no recognizance had been entered into, citing *Paley* on Convictions, 6th ed. 441.

I think this objection not well taken. Section 8, above referred to, does not require a recognizance. The return is made for the assistance of the Court. The recognizance

provided for by 5 and 13 Geo. II. was not required in applications by the prosecutor or the Attorney-General *ex officio*: *The Queen v. Spencer*, 9 A. & E. 485. I understand the opinion of the Court in *Regina v. Wehlan*, 45 U. C. R. 396, to be that the issuing of the *certiorari* under cap. 70, R. S. O., was the act of the Judge, and not the convicted party. See remarks of Cameron, J., in *Regina v. McAllen*, 45 U. C. R., at p. 411.

The effect may be that the prisoner may, on the filing of the return, move to quash the conviction, and so avoid the giving of a recognizance. See *Regina v. Wehlan*, *supra*. This will necessitate greater care in considering the propriety of ordering the issue of the writ. See remarks of Gwynne, J., in *Re Watts*, and *Re Emery*, 5 P. R., at p. 270.

Provision is made in various statutes for issuing the writ of *certiorari*. To these the provisions of the statutes of Geo. II. do not apply. Indeed, it was doubtful if that statute applied to convictions at all. See *Paley*, 6th ed., 442, citing *R. v. Jenkinson*, 1 T. R. 82. I overrule this objection.

On the returns being filed, *Dr. McMichael* moved for discharge of prisoner.

His first ground was, that neither the conviction nor commitment negated the exceptions in the by-law.

The offence, as described in the conviction and commitment, was, "that the said Bella Nunn, of the said city, did, on the 8th day of July, 1884, at London, aforesaid, beat a drum on a public street called Dundas street, in said city, contrary to a by-law of said city of London, No. 179 passed, &c."

The by-law provides, sec. 2, that "no person shall, in any of the streets, or in the market place of the city of London, blow any horn, ring any bell, beat any drum, play any flute, pipe, or other musical instrument, or shout or make, or assist in making any unusual noise, or noise calculated to disturb the inhabitants of the said city."

"*Provided* always, that nothing herein contained shall prevent the playing of musical instruments by any mili-

tary band of Her Majesty's regular army, or any branch thereof, or of any militia corps lawfully organized under the laws of Canada."

The learned doctor contended that this exception should have been negatived, citing *Regina v. White*, 21 C. P. 354.

*Mr. Osler* relied on the rule found in 6th ed. *Paley*, p. 259, taken from *Simpson v. Ready*, 12 M. & W., pp. 736, 740. See also *Thibault v. Gibson*, same vol., at p. 95, cited in *Simpson v. Ready*.

*Mr. Baron Alderson* says, at p. 740: "There is a manifest distinction between a proviso and an exception. If an exception occurs in the description of the offence in the statute, the exception must be negatived, or the party will not be brought within the description. But, if the exception comes by way of proviso, and does not alter the offence, but merely states what persons are to take advantage of it then the defence must be specially pleaded, or may be given in evidence under the general issue, according to circumstances."

In *Charter v. Greame*, 13 Q. B. 216 at p. 227, *Lord Denman*, C. J., said: "The distinction may be between an exception and a proviso: the distance from the enacting part cannot be very important \* \* what are and what are not the same sections depends upon the way in which the statute is printed: what is in the same clause depends on the frame of the sentence."

In *Regina v. White*, 21 C. P. 354, a conviction for selling liquor on a Sunday in contravention of 32 Vic. (O.) ch. 32, sec. 23, was held bad and quashed, because it omitted to state that the liquor was not supplied upon a requisition for medicinal purposes.

Reference to the section will shew that the exception is in the enacting clause.

In *Rex v. Bryan*, 2 Str. 1101, a conviction on 9 Geo. II. c. 23, sec. 1, for retailing gin without a license, was held to be good without an averment that it was not sold to be used in medicine. Reference to the statute will shew that this provision is found in a separate section (12,)

by way of proviso: "*Provided* always that this Act shall not extend to any physicians, &c."

In my opinion this objection fails.

It was then urged that the commitment was bad, because it disclosed no offence either at common law, or under the provisions of the statute or by-law.

The offence, as above set out, is simply beating a drum in a public street.

It was not argued that this was an offence at common law, unless it was so annoying as to be a nuisance.

The statutory provision is 47, Vic. (O.) ch. 32, sec. 13, sub-sec. 12: providing that municipal councils in any city, town, and incorporated village, may pass by-laws "for regulating or preventing the ringing of bells, blowing of horns, shouting, and other unusual noises, or noises calculated to disturb the inhabitants." This is an amendment of 46 Vic. (O.) ch. 18, sec. 496, sub-sec. 8.

It will be observed that beating of drums is not specially provided for, as is "ringing of bells," &c. Had it been, it would be difficult to argue that a municipality would not have power to pass a by-law prohibiting the beating of drums, even though not a nuisance, or unusual, or calculated to disturb; as the Legislature would have stated by implication, if not in terms, that the beating of drums in cities, towns, and villages might prove annoying, and, therefore, if the municipality desired, it might prohibit its being done.

As beating of drums is not mentioned, it must be either unusual or calculated to disturb, to warrant its being prevented by by-law. This, *Mr. Osler* admitted, and with much ingenuity, argued that the usual noises in streets were the rolling of traffic, the patter of feet, the hum of conversation, the noise of trade and commerce. That when the voice was raised to a shout it became an unusual noise, that the beating of drums, as ringing of bells and blowing of horns, could not be said to be common or usual, that one's knowledge of the world and its ways must be applied, and that it was for the Court to say that the



beating of drums was an unusual noise, and hence an offence under the by-law, and that the by-law was warranted by the statute. No authority was cited for this proposition. I have looked, and found none. I cannot accede to it. In my opinion, if the beating of a drum is an unusual noise, or calculated to disturb, it may be prevented, otherwise not. It follows, if I am correct, that evidence must be given, and if given for the Crown, must be received for the prisoner.

In this case evidence was refused on behalf of the prisoner. Although this was taken as a ground for discharge, no authority was cited in its support. I have found none directly in point, but have no doubt it must be a valid ground: *Paley*, 6th ed., pp. 106 and 111, and *Regina v. Biggins*, 5 L. T. N. S. 605, may be referred to on this point.

I am, therefore, of the opinion that the conviction and commitment disclose no offence, that the by-law, so far as it seeks to prohibit the beating of drums simply, without evidence of the noise being unusual or calculated to disturb, is *ultra vires* and invalid, and that as evidence must be given, it must also be received on the prisoner's behalf.

The evidence does not, so far as it goes, shew that the noise is unusual. It is the other way. The only witness says: "Such processions are common on the streets of London, and have been for years." This would have prevented my saying the noises were unusual, even had I the power, as the processions referred to as "such processions" are described as processions with beating of drums.

The evidence does not state that there was beating of drums. It is "playing a drum." Am I judicially to know that beating a drum, and playing a drum are the same

The order must go for the prisoner's discharge.

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## RE WALKER—WALKER v. ROCHESTER.

*Taxation—Solicitor's bill of costs—Payment—Special circumstances.*

After payment of a bill of costs, the Court will not disturb it on the ground of overcharge unless it appears to be a case of gross and exorbitant overcharge amounting to fraud. But before payment it is enough if the items are unusual or more than ordinarily large so as to require justification, and if no explanation is furnished by the solicitor, upon whom the onus to do so rests, then taxation will be ordered.

The following circumstances were held not to be special circumstances which would entitle the client to tax his solicitor's bills after a year from their delivery, because these circumstances could be as well considered at the trial of the action as on a reference to a taxing officer.

- (1.) That the bills sued on contained certain items included in other bills paid by the client; (2) That some work was charged for which never was done; (3) That a payment of \$200 on account by the client was disputed.

*Held*, however, that, the conjunction of the following circumstances, viz. :

- (1) That the relationship of solicitor and client was continued after delivery of the bills; (2) That there was an offer by the solicitor to make a substantial deduction from the bills sued on, and (3) that there were items of apparent overcharge to which no explanation was offered by the solicitor, would justify an order for taxation.

[November 3, 1884.—*Boyd, C.*]

AN appeal from the order of the Master in Chambers directing the taxation of the bills of costs sued on in the action of *Walker v. Rochester*.

The facts appear in the judgment.

*Holman*, for the appeal. The Master in Chambers was much influenced on the argument before him by the existence of a dispute as to an alleged credit of \$200, and the three items of \$10 each for copies of chattel mortgages which the client swears were never ordered or received by him. Clearly the alleged credit can be raised at the trial under the plea of payment, and the copies of chattel mortgages alleged to have been made can likewise be a question at the trial under the general issue. *Marshall* on Costs, pp. 472 and 474: *Shaw v. Arden* 9 Bing. 287. The item "fee \$30" for attending at Toronto two days was reasonable in that the solicitor practiced in Ottawa; the item of \$10 was the only large fee charged, and from the bill it appears that it comprises a period of five days taking in-

structions, perusing documents, &c., in relation to the proposed settlement; there are no other specific allegations of overcharge; the petitioner refers to certain pages of the bill of costs, and says generally that they are in excess of what should be allowed. Twelve months have elapsed since the delivery of the bill, and an action has been brought. Sufficient special circumstances were not shown; £150 was considered not a special circumstance to warrant a taxation after the lapse of twelve months: *Re Elmslie*, L. R. 16, Eq. 326; *Lacey & Sons*, 25 Ch. D. 320; *Re Bethune & Co.*, 4 C. L. T. 251. The onus was on the client, to show special circumstances, it is not sufficient to allege overcharge generally: *Read v. Cotton*, 3 P. R. 118; *Re Gildersleeve and Walkem*, 6 P. R. 117. It is not shown why this application was not made sooner, or that the facts, relied upon were not in knowledge of the client twelve months ago: *Re Whitcher and Thomas*, 13 M. & W. 549. To entitle the client to tax after a lapse of twelve months he must show one of two things, either pressure or gross fraud: *Re Strother*, 3 K. & J. 518; *Re Barnard*, 2 DeG. M. & G. 359. The contention of the relation of solicitor and client is not a special circumstance after the lapse of a year. *Arnoldi v. O'Donohue*, 2 O. R. 322. Where a taxation is ordered after the lapse of a year, and after action brought the costs of the taxation should be in the cause: *Re Barnard*, 2 DeG. M. & G. 359.

*Clement*, contra.

BOYD, C.—The bills of costs now in controversy were delivered to the client on the 23rd day of June, 1883, amounting to \$940.10. Other bills for different and independent work were delivered on the 23rd July, 1884, the taxation of which is not opposed. On the 2nd day of November, 1883, the client gave a note (now paid) of \$500 on account of the first bills, and a memorandum was then signed by the solicitors to the effect that the giving of this note was not to be taken as an admission of the correctness of the said bills or of any of the items therein, and that the bills

were still to be open to dispute, &c., on all legal and equitable grounds, and further that no proceedings were to be taken for the recovery of any of them till the expiry of one month. An action was begun for the bills now in question on 28th July, 1884, claiming a balance of \$421. There is a dispute between the parties as to a payment of \$200, which the client alleges the solicitor received as the proceeds of a promissory note for that amount given on 20th April, 1877. The parties agree that at an interview on 23rd July, 1884, the solicitor offered to take \$150 in full of the bills sued on if it could be shown that the \$200 above mentioned had been paid him. It is also proved that the relationship of solicitor and client existed between the parties down to the time of this action, and afterwards in respect of litigation in *Dobell v. Ontario Bank*, which grew out of some of the matters charged for in the bills in dispute. This *per se* would not justify a taxation after the year, as this Court held in *Arnoldi v. O'Donohoe*, 2 O. R. 322, still it is an element to be considered in weighing the relative position of the parties, and in considering whether in the circumstances a reasonable man would be justified in delaying to seek a taxation, as put by Cameron, J., in *Patullo v. Church*, 8 P. R. 363.

The petitioner relies upon several things as "special circumstances" which are in my opinion of little or no weight. First, that the bills now sued on contain items included in other bills paid by the client. This, if true, is a mere error which a jury or a Judge can rectify on a trial as well as any other tribunal. Next, that some work (3 items footing up to \$30) was charged for which never was done: that is a mere dispute of fact which can be determined as well in the action as by a reference to taxation. Again, that the \$200 payment is questioned, but I should not refer a bill to taxation on that ground after a lapse of twelve months, as the issue payment or non-payment is properly determinable in the ordinary course of litigation. The offer to deduct in substance \$70 from the bill was of such a character as was deemed a special circumstance by

Monaghan, C. J., in *Hughes v. Murray*, 9 L. T. N. S. 93, (1813), a case which is cited in all the text books, though I should hesitate to act upon that single circumstance, *per se*, as such a deduction can be as well (and perhaps more favourably for the client) appreciated by a jury than by the taxing officer.

There are besides various items of alleged overcharge instanced, which are put forward by the client as gross and excessive. One is \$30 for consultation at Toronto, another is \$100 for examining certain papers and taking instructions thereon; another is \$200 made up of various charges connected with the preparation of special bonds and assignments specified in detail; and the last is for attending registry office, perusing abstracts and fees on passing titles of various properties, aggregating in all \$90 and charged on one day, August 18th. The solicitor filed an affidavit in answer but gave no explanation as to any of these items. Affidavits in reply were put in which were in some respects irregular as going to support the petitioner's original case, and then the solicitor sought to file a supplemental affidavit giving more details as to the items complained of, which the Master refused to entertain. This last affidavit if it is looked at, does, I think, sufficiently explain the \$30 charged for consultation at Toronto, and perhaps sufficiently as to the \$100 for examining papers &c.; not so satisfactorily as to the next \$200 objected to and not at all as to last set of charges. As to these last all that is said in the affidavit is in paragraph 8, "the other services \* \* are the ordinary ones usually allowed solicitors in procuring abstracts and passing titles." But the peculiar characteristic of the charge is, that the work was all done in one day and consists chiefly of twelve attendances at the registry office to bespeak, and for, continued abstract of title to twelve parcels of land all belonging to sub-division 39 in 1st con., O. F. Nepean, and fees of \$5 each for perusing abstract and papers and passing titles of these lots. This is a series of related items which requires explanation before passing the charges as proper. The lots



all belong to one parcel sub-divided, the abstract previously had by the solicitor appears to be continued in the same way as to each sub-division, and a uniform fee of \$5 in passing each lot (aggregating \$60) is charged. I am far from saying that the charges may not be justified and allowed upon taxation, but they do require something more of detailed reasons to support them than the solicitor has given.

Now a very clear distinction is to be made as to what are special circumstances in the way of overcharges before and after payment of the costs. After payment the Court will not disturb the bill on the ground of overcharge unless it appears to be a case of gross and exorbitant claim, amounting to fraud, but before payment it is enough if the items are unusual or more than ordinarily large so as to require justification, and if no such explanation is furnished, then a reference will be ordered. That was distinctly affirmed as the law in *Re Robinson*, L. R. 3 Exch. 4, and the same view has been held both before and since that case. Since then it has been followed by Malins, V. C., in *Watson v. Rodwell*, 7 Ch. D. 625, and before then in *Re Brady*, 15 W. R. 632, and *Re St. B. Hook*, 5 L. T. N. S. 502.

The distinction between a paid and an unpaid bill of costs in this regard is adverted to by Turner, L. J. in *Ex parte Bateman*, 23 L. J. (Bankry) 11, and he there uses language which I adopt as entirely pertinent to the view I take of the circumstances of this case. He is thus reported: "If you find a series of charges *prima facie*—for I do not intend to intimate that any one of these charges may not be maintained in the result—unreasonable, unexplained, and not attempted to be explained, whether rightly or wrongly, if you find such a series of charges as are to be found in the present case, that is, my opinion, a matter requiring investigation, and quite falling within the rules by which the Court would require an investigation to be had."

*Re Harle* 17 W. R. 21 was a case in which this distinction was overlooked, and the language of Lord Cottenham in *Horlock v. Smith*, 2 M. & Cr. 495, was there applied (as by



the Court in *Ex parte Bateman*) as if it was referable to an unpaid bill.

*Re Bethune & Co.*, 4 C. L. T. 251, was a case in which I thought the apparently excessive charges were sufficiently cleared up by the affidavits of the solicitor as was done in *Ex parte Andrews*, 13 L. J. N. S. Eq. 222. In case of an unpaid bill the onus is clearly upon the solicitor to justify the propriety of such items as was intimated in *Re Towle*, 30 Beav. 170. Here the solicitor failed to explain at the proper time: he explained only partially in an affidavit which the Master ruled was not admissible, and as a matter of strict practice that ruling was right, so that we have a conjunction of circumstances which support the order now in appeal: that is we have the continued relationship of solicitor and client, we have the offer to make a substantial deduction from the bill sued on, and we have items of apparent overcharge as to which no explanation is made: *Re Nicholson*, 3 DeG. F. & J. 93.

I think the proper direction as to the costs will be, to reserve the costs of taxation, and costs of action till the close of the taxation, and then have them disposed of by a Judge in Chambers. The costs of this appeal are to go in any event to the client.

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## BRIGHAM V. MCKENZIE.

*Venue—Master in Chambers—Jurisdiction of—County Court action—R. S. O. ch. 50, sec. 155, and ch. 39, sec. 31—Rules 420–427 O. J. A.—ss. 3, 9 and 12 O. J. A.*

The plaintiff in a County Court action laid his venue at Toronto. The Master in Chambers changed it to

On appeal, BOYD, C., discharged the Master's order on the undertaking of the plaintiff to pay the extra expense (\$25 or \$30) of a trial at Toronto.

*Semble*, The Master in Chambers has not jurisdiction to change a venue under R. S. O. ch. 50, sec 155, as the rule of Court passed 1st February, 1870, under the authority of 33 Vic. ch. 11, delegates to the Master only the jurisdiction the Judges of the Superior Court then possessed in certain matters, and it was not till the passing of 35 Vic. c. 10 (1872), that Superior Court Judges had jurisdiction in such matters in County Court actions.

Nor has the Master in Chambers power under Rule 420 O. J. A., as that is limited to "actions and matters" in the High Court, and a motion of this kind is neither "matter" nor "proceeding" (sec. 91 O. J. A.) in the High Court.

No objection to his jurisdiction was taken before the Master however :

*Held*, that the application having been entertained, an appeal to a Judge in Chambers, of the Chancery Division, instead of to a Judge of the C. P. or Q. B. Divisions, was proper under R. S. O. ch. 39, sec. 31, and Rule 427 O. J. A., the effect of the O. J. A. being to abolish all distinctions between Superior Courts of Law and Equity.

[November 17, 1884.—*Boyd, C.*]

AN appeal from the order of the Master in Chambers, changing the venue in a County Court action.

The facts appear in the judgment.

*Morson*, for the appeal.

*Shepley*, contra.

BOYD, C.—This is a County Court action in which the Master in Chambers has made an order to change the venue under R. S. O. ch. 50, sec. 155. The jurisdiction is there given to a Judge in Chambers of one of the Superior Courts, but it is said that the Master had delegated jurisdiction under R. S. O. ch. 39, secs. 29–32, and the rules of the Court in that behalf. It was assumed in *Mahon v. Nickolls*, 31 C. P. 22, that the Master had jurisdiction in such cases, but the attention of the Court was not called to the point upon which I now very much doubt the jurisdiction of the

Master. The only rule of Court passed to give effect to the sections I have cited of R. S. O. 39, is one to be found in 29 U. C. R. 623, which took effect on 21st February, 1870. That was passed under the original of R. S. O. ch. 39, namely, 33 Vict. ch. 11. Then the Act giving jurisdiction to the Judges of the Superior Court in this item of County Court business was not passed till 35 Vict. ch. 10 (1872,) and the rule of Court in question did not embrace it, because it is limited to such business as was transacted by the Judges in Chambers prior to the passing of the rule. The Act 33 Vict. ch. 11 does authorize the making of rules to cover any jurisdiction accruing to the Judges thereafter, and there was the power to pass a rule to embrace this particular matter, but I do not find that it has since been exercised. Nor does it appear to me that jurisdiction is conferred upon the Master by Rule 420 of the Judicature Act. That is limited to "actions and matters in the High Court." This action is in the County Court, and one can hardly regard the application under section 155 as a "matter" in the High Court without doing violence to the ordinary meaning of language. By the interpretation clause of the Judicature Act, sec. 91, "matter" includes every proceeding in the Court not in a cause. This isolated application cannot, in any proper sense, be regarded as a *proceeding* in the High Court.

The Master, however, having entertained the application, it is competent to appeal from that under R. S. O. ch. 39, sec. 31, and *Rule* 427. Under the practice, before the Judicature Act, this appeal could only be lodged in one of the Superior Courts of law. But the effect of the Judicature Act is to abolish all distinction between Superior Courts of law and of equity. All the divisions are members of the one Court—the High Court of Justice—having co-ordinate powers and jurisdictions, and being alike Courts of equity and law. The jurisdiction formerly exercisable by the Courts of law, and any of the Judges of those Courts, (which would cover a case like that under section 155 of R. S. O. ch. 50,) is transferred to or vested

in, or is capable of being exercised by the High Court and its Judges without distinction. *Judicature Act*, secs. 3, 9, and 12. So that I do not feel pressed with the objection urged against my jurisdiction to review the decision complained of. Apart from the difficulty as to the jurisdiction of the Master, which I may say was not taken or urged before him, I should not, myself, have changed the venue on the materials filed. As the case presents itself to me, I should say that the undertaking of the plaintiff to pay the \$25 or \$30 extra expense occasioned by retaining the venue where he laid it, ought to have been accepted. Upon this undertaking, I direct that the place of trial be, as at first, at Toronto.

The costs of the appeal before the Master and this appeal will be costs in the cause in any event to the plaintiff.

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## FUCHES V. HAMILTON TRIBUNE COMPANY.

*Winding up company—Rent—Landlord—Liquidator—45 Vic. ch. 23 (C.)*

The winding up of a company under 45 Vic. ch. 23 (C.), commences from the time of the service of the notice under sec. 12, and, therefore, under sec. 69 a landlord's claim to be paid preferentially for overdue rent after such service is invalid.

An undertaking by a provisional liquidator in possession to pay such a claim is, by secs. 20 and 21, *void* unless the permission of the Court is first obtained.

[November 17, 1884.—*Boyd, C.*]

AN appeal from the ruling of the Local Master at Hamilton, in a reference under a winding up order refusing to allow the landlords of the defendants to rank preferentially on the estate in respect of overdue rent.

The facts appear in the judgment.

*Walker*, for the appeal.

*Carscallen*, contra.

BOYD, C.—The landlords of the defendants had a claim for nine months' rent overdue on the 4th January, 1884, and on that day gave the usual notice of their claim to the sheriff who had previously seized the goods of the company under an execution. On the next day an order was made for the winding up of the defendants as an insolvent company under the Act 45 Vict. ch. 23 (Dom.) Service of the notice under section 12 of the Act had been made on the 31st December, 1883. The provisional liquidator took possession on the 5th January, whereupon the sheriff gave up possession of the property. On the 7th January, the landlords assumed to levy a distress for overdue rent, and on the 10th January, withdrew their bailiff, in consequence of an undertaking given by the provisional liquidator, to pay the claim out of the first moneys after a proper adjustment of what was really due.

The liquidator, (who was also the provisional liquidator,) having declined to be bound by this undertaking, the landlord advanced a claim to be paid preferentially, which the



Local Master disallowed, and from this decision an appeal has been lodged. Under sections 20 and 21 of the Act the actual distress made on the 10th January was inoperative and void, and the liquidator representing the creditors cannot be compelled to give effect to the undertaking he gave as provisional liquidator. So to do would be virtually to repeal the Act, and to permit what the Act forbids, unless the permission of the Court is first obtained.

Does any reason exist then, for permitting a preference to the landlord in respect to this rent? As I read the Act, section 69 is fatal to this claim, because that provides that no lien or privilege is created by execution or by attachment, garnishee order, or other process or proceeding, if, before the payment over of the moneys made thereunder, the winding up of the business of the company has commenced. This relates back to section 12, and here the winding up had begun on the 31st December. No step was taken by the landlords to assert their lien for rent till after the winding up had begun, and the great preponderance of authorities is clear that the Court will not aid the landlord in regard to rent due at that date. The cases are collected in *Re Oak Pitts Colliery Co.*, 21 Ch. D. 329. Some earlier decisions looking the other way such as *Re Bastow*, L. R. 4 Eq. 681, are explicable either by reason of special equities, and considerations (which have not been made to appear in this application,) or are not now to be followed as safe guides.

I affirm the decision of the Master, with costs.

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## STEWART V. DICK.

*Will—Legacy—Directions to executors to pay—Charge on real estate.*

A testator devised his real estate and chattel property (excepting some bequests to his wife) to his son Robert, subject to the payment of his just debts, funeral expenses, and certain specified legacies, which legacies he directed his executors to pay.

By a codicil he directed the chattel property (except the specific bequests to his wife) to be sold, and the proceeds equally divided amongst all his children.

*Held*, that the specific legacies were a charge on the real estate.

[October, 7, 1884.—*The Master-in-Ordinary.*]

THIS was a reference to the Master to ascertain whether certain legacies were charged on the testator's real estate.

*G. H. Watson*, for the legatees.

*Bain*, Q. C., contra.

MR. HODGINS, Q. C., MASTER-IN-ORDINARY.—The testator by his will devises his real estate and chattel property (excepting some specific bequests to his wife) to his son Robert, subject to the payment of his just debts, funeral expenses, and certain legacies (specifying them), which legacies he directs his executors to pay. By a subsequent codicil he directs the chattel property, except the specific bequests to his wife, to be sold by his executors, and the proceeds divided equally amongst all his children named in his will.

It is contended that by directing his executors to pay the legacies specified in his will, the testator intended to charge them on his personal estate only, and not on his real estate. Such an argument is proper where the will contains no clear specific charge on either real or personal estate.

But in this case the intention of the testator is clear. Though the codicil makes other disposition of the chattel property, the real estate passes under the will to his son Robert, subject to the payment of the charges created thereon by the testator.

The observations of Sir W. M. James, L. J., in *Allan v. Gott*, L. R. 7 Ch. App., at p. 443, aptly apply to this case: "A testator may also do this—he may give to a specific devisee, or to a specific legatee, a portion of both of his real and personal estate; for instance, he may give his freehold house, together with his leasehold coach-house and stable, together with the furniture and effects in the house, coach-house and stable, all to one person, charged with the payment of an annuity or a sum of money to some other person. In that case there would be no question of priority as between the freehold and personal parts of that which constituted one subject of gift to one person; but so far as it might be necessary to ascertain the effect of the charge upon a subsequent devolution of the title, the whole charge in that case would be a charge equally upon all and every part of the subject of the gift."

So in *Bray v. Stevens*, 12 Ch. D. 162, Bacon, V. C., says: "*Greville v. Browne*, 7 H. L. C. 689, decided that there had been, for hundreds of years before that case came before the Court, a plain rule, that where a testator gives pecuniary or other legacies, and gives the residue of his estate bound up, blended, tied together,—the whole of his property is subject to his legacies,—the legacies must be held to be charged upon that entirety."

The case of *Re Brooke—Brooke v. Brooke*, 3 Ch. D. 630, shews that a direction to executors to pay certain legacies will not exonerate the real estate devised to other parties, if it appear that it was the intention of the testator to charge such real estate.

No other question was argued before me but the one which I now decide in favour of the legatees: that their legacies are a charge upon the testator's real estate.

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## CLARKE V. UNION FIRE INSURANCE COMPANY.

## CHABOT'S CASE.

*Foreign commission—Transmission out of jurisdiction of documents to be used thereunder.*

Books and documents produced in an action may, when a proper case is made out, be sent out of the jurisdiction for the purpose of the examination of witnesses before a foreign commission.

But documents produced in another action, which is *sub judice*, will not be taken from the office for such a purpose.

[November 4, 1884.—*The Master-in-Ordinary.*]

ON this reference an order had been made for a commission to take evidence in Winnipeg; and an application was now made for an order to transmit to the commissioner certain books and documents in the hands of the receiver in this suit.

*R. S. Cassels*, for the applicant.

*W. A. Foster*, for the plaintiff.

MR. HODGINS, Q. C., MASTER-IN-ORDINARY.—This application is supported by the affidavits of the applicant's solicitor in which he states that certain books (naming them) will be required for use on the examination of witnesses, and that it will be necessary, in the interests of the applicant, that the said books should be forwarded to Winnipeg to be used in the taking of such evidence.

The plaintiff's solicitor makes an affidavit stating that some of the books referred to have been produced in another action now before the Court of Appeal, and that it is material, on the hearing of the appeal, to shew an original entry in one of the books.

There is no direct authority for the order asked for; but such an order may, I think, issue where a proper case is made out. In *Lafone v. Falkland Islands Co.*, 4 K. & J. 39, Sir W. Page Wood, V. C., on a similar application stated that none of the registrars of the Court knew of

such an order; but he added: "It appears to me that cases might well exist in which it would be right and proper for the sake of justice to order original documents to be carried out of the jurisdiction, all proper care being taken by indemnity and otherwise to secure their safe return." But he thought that a special case had not been made out in the case before him.

*Re Stephens*, L. R. 9 C. P. 187, which, though against his contention, was very properly cited by Mr. Cassels, shews that documents which are produced in an action, which is *sub judice*, will not be taken from the office of the Court in another action, for the purpose of being sent out of the jurisdiction.

During the argument in that case Lord Coleridge, C.J., made the novel suggestion that "the difficulty might be got over by taking photographic copies,—a thing which is by no means uncommon at the present day."

These cases may be referred to as shewing that documents may, in a proper case, be allowed to be sent out of the jurisdiction for the purposes of an examination of witnesses before a foreign commission. But as the applicant's affidavit in this case is as defective as the one read in *Lafone v. Falkland Islands Co.*, 4 K. & J. 49, and as some of the documents asked for are *sub judice* in another action in the Court of Appeal, I must refuse the present application.

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## IN RE QUEEN CITY REFINING COMPANY.

*Winding up—Insolvent company—Reference to Master-in-Ordinary—Jurisdiction of judicial officers named in 47 Vic. (D.) ch. 37—Delegation of judicial powers.—References under O. J. A.*

The Dominion Insolvent Companies Act, 45 Vic. ch. 23, as amended by 47 Vic. ch. 39, authorizes the Master in Chambers, the Master-in-Ordinary, or any Local Master or Referee to exercise the powers conferred upon the Court in Ontario for the purpose of winding up insolvent companies. The Master in Chambers, as one of the judicial officers named in the Act, made an order for the winding up of an insolvent company, and referred it to the Master-in-Ordinary to settle the list of contributories, take all necessary accounts, make all necessary inquiries and reports, and generally to do all necessary acts, matters, and things for the winding up of the business of the said company.

*Held*, (1) that the powers vested in the judicial officers named in the Act were conferred upon each of them as *persona designata*, which they were not authorized to delegate to others or to each other; (2) that the reference was not authorized by the Judicature Act or Rules, or the prior Acts and Rules conferring jurisdiction upon the former judicial officers in Chambers; (3) that the jurisdiction of the Master-in-Ordinary under order of the reference would be a delegated jurisdiction as the substitute or deputy of the Master in Chambers, and not the co-ordinate jurisdiction conferred upon his office by the Act; (4) that the order of reference was not therefore warranted by the Dominion or Provincial Acts, and could not be proceeded on.

A judicial officer cannot delegate the discharge of his judicial functions to another unless expressly empowered so to do.

The various kinds of references to judicial officers under the Ontario Judicature Act commented upon.

[November 12, 1884.—*The Master-in-Ordinary.*]

A reference from the Master-in-Chambers under the Dominion Winding up Act, 1882.

*T. P. Galt*, for petitioner.

MR. HODGINS, Q. C., MASTER-IN-ORDINARY.—In this matter a winding up order has been made by the Master in Chambers, under the Dominion Insolvent Companies Act, in which he refers it to the Master-in-Ordinary to take the usual accounts for winding up the above company.

The jurisdiction of the Master in Chambers in this matter is derived from the Dominion Act 45 Vic. ch. 23, sec. 77, sub-sec. 2, which, as amended by 47 Vic. ch. 39, sec. 5, reads as follows :

"In the Province of Ontario such powers [of the Court] may, subject to an appeal according to the ordinary practice of the Court, be exercised by the Master, Referee, or other officer, who, under the practice or procedure of the Court, presides in Chambers, or by the Master-in-Ordinary, or by any local Master or Referee."

As the jurisdiction under this Dominion Act is new, and affects large financial and commercial interests, it is important to the litigants concerned, whether as creditors or contributories, that all the initiatory judicial proceedings should be strictly regular, and should not be liable, on the appeal of some dissatisfied litigant, to be adjudged *coram non judice*; for "where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and no party can in the least be bound by it:" *Attorney General v. Lord Hotham*, 1 T. & R. 209; *S. C.*, 3 Russ. 415.

The judicial powers created by the Act may be exercised by (1) the Court, or (2) a Judge, or (3) the Judicial Officers named. These judicial officers have, under the Act, co-equal judicial powers; and, therefore, if it is within the jurisdiction of the Master-in-Chambers to make this order, it is equally within the jurisdiction of any Local Master or Referee to delegate the winding up an insolvent bank or company to the Master-in-Ordinary.

The order refers the whole action, facts and law, and directs me "to settle the list of contributories, take all necessary accounts, make all necessary enquiries and reports, and generally to do all necessary acts, matters, and things for the winding up of the business of the said company under the provisions of the said Acts;" and it authorizes the liquidator to pay to the petitioner his costs of the proceedings, and of the reference "from time to time out of the moneys of the said company."

Prior to this Act none of the judicial officers named had any jurisdiction to make winding up orders. The Master in Chambers, whose office is created by rule of Court, and the Master-in-Ordinary, whose office is created by statute,

exercised only a delegated jurisdiction, according to the mandate of the Court, or as defined by the rules. In vesting this new jurisdiction in the High Court of Justice, the Act authorizes these judicial officers to exercise "the powers conferred by this Act upon the Court." The Act defines the jurisdiction and prescribes the procedure, and then declares that the powers conferred on the Court are to be in addition to any other powers subsisting either at law or in equity for the special matters set out in sec. 92.

These latter powers would vest in the Court with the new jurisdiction. For where the Legislature gives a Court any powers in general terms, and without any express limitations, it is the same as if these powers were given by the common law; and the Court may exercise them in the ordinary and usual way in which the Court is accustomed to exercise its ordinary powers: *Sweeton v. Collier*, 1 Exch. 457.

The judicial power conferred upon the Judicial Officers named in the Act, is conferred upon each of them as *persona designata*, and is personal to each according to his official designation, and is a jurisdiction or trust which he is unable to delegate to another,—as a Justice of the Peace is unable to delegate his functions to his clerk or a deputy. These officers cannot, I think, be held to have the ordinary or common law jurisdiction of Judges, each of whom, as a member of the Court may, in addition to "the powers conferred by the Act,"—unless the context restricts,—exercise other judicial powers as the delegate of the Court.

"Delegated jurisdiction as contradistinguished from proper jurisdiction, is that which is communicated by a Judge to some other person who acts in his name and is called a deputy; and this jurisdiction is held in law to be that of the Judge who appoints the substitute or deputy, and not of the latter party; and in this case the maxim holds: *Delegatus non potest delegare*; the person to whom any office or duty is delegated, for example, an arbitrator, cannot lawfully devolve the duty on another, unless he is

expressly authorized so to do. Nor can an individual clothed with judicial functions delegate the discharge of those functions to another, unless, as in the case of a County Court Judge, he be expressly empowered to do so under specified circumstances. For the ordinary rule is, that although a ministerial officer may appoint a deputy, a Judicial Officer cannot :” *Broom’s Legal Maxims*, p. 840.

There are two senses in which the term “Judicial Officer” may be used : one the popular sense which applies generally to an officer of a Court ; the other the strictly legal sense which applies only to an officer who determines causes *inter partes* : *Jewison v. Dyson*, 9 M. & W. 540.

It is to the latter officer the maxim applies.

When an Act of Parliament which gives authority to a person describes him by his official name, the enactment only applies within the limits of his office : *Rex v. Fylingdale*, 7 B. & C. 438 ; *Rooke v. Errington*, 7 H. L. Cas. 632.

These references show that judicial officers, even county Judges in England, have no authority to delegate to others the judicial powers vested in them, unless expressly empowered so to do. See further on this, *Wetherfield v. Nelson*, L. R. 4, C. P. 571. And they also show that the jurisdiction which the Master-in-Ordinary would exercise under this order would be a delegated jurisdiction as the substitute or deputy of the Master-in-Chambers, not as the substitute or deputy of the Court or a Judge, and not the independent judicial powers conferred upon his office by the Act.

Nor do I think the order sustainable by reference to the Chamber jurisdiction created by the statutes and rules prior to or under the Judicature Act. The jurisdiction of Chancery Chambers, under G. O. 560, to refer to the Master only applied to the administration of estates (unopposed) ; the sale of infant’s estates ; and to mortgage cases where infants were concerned. In *Brown v. Dollard*, 6 P. R. 113, Mr. Taylor, Referee in Chambers, made an order referring to the Master at Cobourg to ascertain whether one Horkins, who had been ordered to attorn to the



receiver, held certain property as tenant or as mortgagor. The order was moved against some months after, on the ground of want of notice to the mortgagee; but Mr. Holmsted, then sitting as Referee, made another order referring the inquiry again to the Master, with liberty to the applicants to show that Horkins was not entitled to redeem. Spragge, C., on an appeal from the latter order, held that both orders were *ultra vires*, and that the Referee in Chambers had no jurisdiction to order such references to a Master; and he set aside both orders. Other cases decide that a new jurisdiction in Chambers created subsequently to the Act authorizing the delegation of Chamber business to a judicial officer, would not vest in such officer: *Queen v. Smith*, 7 P. R. 429; except where the new jurisdiction was an extension of that already vested in him: *Collier v. Swayze*, 8 P. R. 421; *MacLennan's Judicature Act* (Langton's ed.) 516.

By Rule 420, O. J. A., the Master in Chambers, is to have the power, authority, and jurisdiction, "*heretofore possessed*" by the Clerk of the Queen's Bench and the Referee in Chancery. The cases just cited define the extent of the jurisdiction at that time possessed by the judicial officers referred to.

The Judicature Act (sec. 47) authorizes the High Court or a Divisional Court or "a Judge before whom a cause or matter may be depending," to refer "any question arising in such cause or matter," to a County Judge or Official Referee "for inquiry and report." Section 48, authorizes the Court or a Judge, "in any cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot in the opinion of the Court or Judge conveniently be made before a jury, or conducted by the Court or Judge directly," to order "any question or issue of fact, or any question of account arising in the cause or matter" to be tried before a County Judge or Official Referee.

The extent of the jurisdiction to refer, and the effect and application of these two sections of the Judicature Act



were elaborately reviewed by Osler, J., in *Cummings v. Low*, 2 O. R. 499. Under these sections all that can be referred are (s. 47) a question or questions for inquiry and report, or (s. 48) issues to be tried; and if only certain issues, the order of reference should so state. The whole action, facts and law, cannot be referred: *Longman v. East*, 3 C. P. D. 142.

Secs. 47 and 48 of our Judicature Act are similar to secs. 56 and 57 of the English Judicature Act, 1873.

In the case last cited (3 C. P. D., at p. 152), Brett, L. J., summarized the old and new jurisdictions as to references. The old he classed as: (1) arbitration by consent; (2) compulsory arbitration under the Common Law Procedure Act; (3) reference of matters of discipline and similar questions to the Common Law Masters for report; (4) reference of questions and accounts in Chancery to Chambers (or Master) for report. The new jurisdiction under the Judicature Act he defined to be: (1) under s. 56 (Ont. s. 47), a new power as well as a new tribunal given to the Common Law Divisions, to do what the Court of Chancery had previously jurisdiction to do; and (2) under s. 57 (Ont. s. 48), powers which neither the Common Law nor Chancery Courts possessed before, to send "certain questions or issues," not for report but, "for trial," to an official or special referee.

From its wording, section 47 cannot be read as applying to a jurisdiction in Chambers. And if the cases cited in *MacLennan's* Judicature Act, p. 516, correctly state the law, the jurisdiction of the Judicial Officer in Chambers does not extend to the new jurisdiction conferred by section 48, it being as the Lord Justice held, one not theretofore possessed by any of the Courts; and *a fortiori* not to the new jurisdiction created by this Dominion Act.

The importance of having these initiatory judicial proceedings strictly regular will be seen, when it is considered that this Act practically makes the officers named Dominion judicial officers whose judicial acts affect persons and properties beyond the limits of the Province within which they

act; just as the judicial acts of County Judges affect persons and properties outside the county of which they are the judicial officers; and that the liquidator appointed by any one of these Dominion judicial officers, in the name of the Court, may take the custody and control, of all the property, effects, and *choses in action*, of the insolvent bank or company within all the Provinces and territories of the Dominion, and has the right to sue by his name of office in any of the Provincial Courts without obtaining any new grant of office, or control of property, from any Court other than from the Court appointing him.

For these and other reasons I hesitate to undertake the delegated powers sought to be conferred upon me by the order of the Master in Chambers (a).

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### BROWN V. NELSON.

*Interpleader by sheriff—Fi. fa. goods—Stock—R. S. O. cc. 54 & 66.*

Shares of the stock of an incorporated company may be seized and sold under the Execution Act, R. S. O. ch. 66, by a sheriff under a *fi. fa.* goods, and he is entitled to an interpleader under sec. 10 of the Interpleader Act, R. S. O. ch. 54, where an adverse claim to the stock is advanced.

The trial of the issue was, however, stayed until after the trial of an action between the same parties attacking the conveyance from the judgment debtor.

[November 5, 1884. { *The Master in Chambers.*  
Cameron, C. J.

THE defendant having obtained judgment against the plaintiff for \$38,000, and interest, issued a writ of *fi. fa. facias* goods, and placed the same in the hands of the sheriff of York.

The sheriff seized under the writ forty-four shares of the capital stock of the *Globe* Printing Company, alleged to be the property of the plaintiff.

(a) See the judgment of Boyd, C., in *Re Joseph Hall Manufacturing Company*, *post*.

An assignee of the judgment debtor claiming the stock, the sheriff now applied for the usual interpleader order.

*Aylesworth*, for the sheriff.

*C. R. W. Biggar*, for the execution creditor, opposed the application.

*Wallace Nesbitt*, for the claimant.

THE MASTER IN CHAMBERS.—In this case the sheriff seized stock in the *Globe* Printing Co. There is an adverse claim by a claimant who asserts a right under a conveyance from the judgment debtor. It is objected that the sheriff cannot have an interpleader, because this stock is not goods or chattels.

Sec. 10 of our Interpleader Act, which relates to sheriffs, gives the sheriff the remedy by interpleader where a claim is made to any "goods or chattels," or to any interest in any goods or chattels taken, *or intended to be taken*, under an attachment against an absconding debtor, or in execution under any process issued by or under the authority of the Courts—or to the proceeds or value thereof—or to the proceeds or value of any lands or tenements taken and sold under any such process.

It is true that stock may not be, for some purposes goods or chattels, but it is often necessary to consider the association and connection in which words are used, to find their real meaning on a particular occasion. For instance, the luggage of a passenger is, in a general sense, goods or chattels; but in *The Queen v. The Judge of the City of London Court*, 12 Q. B. D. 115, such luggage was held not to be "goods" in a case under a particular statute; no doubt quite rightly so held; but it is just as certain that in almost any other connection a passenger's luggage would be rightly described as goods.

The stock in this case was seized under a *fi fa*. goods. Our enactment as to the sale of such stocks under execution, is contained in secs. 20 to 26, inclusive, ch. 66 R. S. O., and these sections are grouped together in the Act

under a very significant heading, "*What may be sold under execution against goods.*"

These sections declare the stock to be personal property, (sec. 23) and enact that it may be attached, seized, and sold under writs of execution in like manner as other personal property may be sold under execution, and they point out the manner in which the sheriff is to proceed.

This seems to me to bring the case under the Interpleader Act. In this connection stock does mean "goods" for all the purposes of the Execution Act, and of the clause for relief to the sheriff by interpleader. The argument to the contrary seems founded on an insufficient view of the scope of these two statutes. The inclination should be to advance the remedy. I refer to a case of *Wood v. Hurl*, 28 Gr. 146, decided by Proudfoot, V. C., and to the cases the learned Judge there cites, as to the effect of such a heading as is here to a group of sections in an Act of Parliament.

*Biggar*, for the execution creditor, then asked for a postponement of the trial of the issue until after the trial of an action brought in the Chancery Division attacking the conveyance from the judgment debtor. The Master, after consideration, delivered the following judgment:

THE MASTER IN CHAMBERS.—It remains to order as to the trial of the issue.

It is suggested that it would be better to let the interpleader stand until the trial of the action which has been commenced, in which the judgment debtor and the assignee of the stock are both parties. Our statute, I think, authorizes such a course, and it has been followed in cases calling for it.

I agree that it will be much more satisfactory to have the validity of the assignment, which is the sole question important in the interpleader, settled in a proceeding in which the assignee as well as the judgment debtor shall be a party. The decision of that action must practically

put an end to the interpleader, and I think the best order to make is this, that all proceedings in the interpleader after the making of the interpleader order be stayed until the trial of that action, or until further order.

On appeal from the decision of the Master, postponing the trial of the issue, argued by the same counsel.

CAMERON, C. J.—The Master has, I think, exercised a sound discretion in postponing the trial of the interpleader issue between the parties until the trial of the action in the Chancery Division has taken place. The same question is involved in both; but the action in the Chancery Division, although it embraces the question at issue in the interpleader suit, is more extensive in its object, and seeks a larger amount of relief than can be given in the interpleader. There does not appear to me on the facts any probability that in the one proceeding more than in the other the final end of the litigation will be sooner reached. It is, therefore, better for all concerned that the questions at issue should be disposed of in the one action, and for the reason assigned, that the action in the Chancery Division will more fully determine the rights of the parties than the interpleader, the discretion exercised by the learned Master in Chambers ought not to be interfered with. While it may be true in many cases that the party who has first commenced the litigation should not be deprived of the control of it, it is not so universally; but in the present case the defendant's suit was in fact first commenced, though it was not brought to the notice of the claimant by service of the summons till after her claim to the goods seized by the sheriff had been preferred. I have not delayed giving judgment on account of any difficulty in the way of the decision, but from being engaged with other and more pressing matters. The appeal must be dismissed, with costs, to be costs in the interpleader suit to the defendant in any event of the issue.

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## RE REES—URQUHART V. TORONTO TRUSTS COMPANY.

*Master's office—Security for costs—Creditors.*

Parties residing out of the jurisdiction who come into the Master's office in an administration action pursuant to a notice to creditors, and claim to be creditors of an estate administered there, will be required to give security for costs.

[November 26, 1884.—*The Master-in-Ordinary.*]

In this case an order had been made for the administration of the testator's estate, and an advertisement issued, calling upon creditors to come in and prove their claims in the Master's office. Among the claims brought in was one by Frederick Rees, of the town of Hamilton, in the island of Bermuda. Before proceeding on the claim the plaintiff moved for an order requiring the claimant to give security for costs.

*S. M. Jarvis*, for plaintiff.

*H. D. Gamble*, for claimant.

MR. HODGINS, Q. C., MASTER-IN-ORDINARY.—It appears, on the face of the claim brought into the Master's office, that the claimant resides in the island of Bermuda, out of the jurisdiction of this Court. The motion for security for costs is resisted on the ground that the claimant is brought here by the plaintiff pursuant to the advertisement. This is true, but it is optional to the claimant to come in or not. If he does, he thereby becomes a *quasi* plaintiff against the testator's representatives, and has actively to prosecute his claim until it is allowed against the estate or disallowed. I find that in the case of *Darling v. Darling*, the former Master, in 1879, ordered certain parties resident out of the jurisdiction, who claimed to be legatees of the testator in that case, and who like this claimant were brought under a similar advertisement,

to give security for costs. I think a similar order must issue in this case, and I fix the security at \$200, to be given in four weeks, and in default that the claim be disallowed.

See also *Drever v. Mandesley*, 5 Russ. 11.

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### HILLIARD V. ARTHUR.

[November 21, 1884.—*The Divisional Court, Q. B. D.*]

*Clement*, for the plaintiff appealed from the judgment of Rose, J., in Chambers (reported *ante* p. 281), refusing an order to set aside judgment entered for the defendant at the trial of the action before Patterson, J. A., the plaintiff not then appearing.

*Aylesworth*, for the defendant, contra.

WILSON, C. J.—We dispose of the case by saying it is of no use to consider the ground on which Rose, J., refused—because, however that order may be considered, the plaintiff cannot get over the difficulty that he was moving before Rose, J., substantially upon the same ground upon which Patterson, J., had given judgment; and no motion was made in this Court in time to obtain relief—if this Court could have entertained an appeal from Mr. Justice Patterson's decision.

ARMOUR and O'CONNOR, JJ., concurred.

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## FRIENDLY V. NEEDLER.

[November 24, 1884.—*The Divisional Court, Q. B. D.*]

*Walter Read*, for the defendant, appealed from the judgment of Rose, J., in Chambers, (reported *ante* p. 267,) refusing prohibition to the clerk of the 10th Division Court of the county of York.

*Wallace Nesbitt*, for the plaintiff, contra.

WILSON, C. J.—It appears the defendant gave notice of exception to the jurisdiction, and did not appear to support it. The plaintiff at the trial satisfied the Judge the case was within the jurisdiction of the Court, and he gave judgment.

An appeal was made to Rose, J., and he was of opinion there was evidence sufficient before the Judge at the trial to support the jurisdiction.

Rose, J., held also, the Division Court in Toronto could not be prohibited because the case had been transferred by transcript to the Division Court at Orillia, and the motion for prohibition should have been that the writ should be directed to the Court at Orillia. Besides the writ is in the discretion of the Court, and it should not, if it can, be granted after execution issued to aid the defendant at that stage of the case when he did not appear to support his own notice of want of jurisdiction at the proper time.

ARMOUR and O'CONNOR, JJ., concurred.

*Motion discharged, with costs.*

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## VANSTADEN (EX. CREDITOR) V. VANSTADEN (EX. DEBTOR).

## RICHARDSON (CLAIMANT).

*Interpleader—Costs—Special directions to sheriff—Adverse claim—  
Scandalous matter in affidavits.*

When a writ of *fi. fa.* goods is placed in a sheriff's hands, and special directions are given to him to seize particular goods, though not in contemplation of an adverse claim, if the execution creditor abandons after interpleader proceedings have been taken, he must pay the sheriff's and claimant's costs.

Where the special directions were sworn to on one side and denied on the other, it was held that the sheriff must be assumed to have acted only under the writ, without such directions, and an appeal from the Master's order refusing costs to the sheriff was dismissed, but without costs, as the affidavit in denial contained impertinent and scandalous matter.

[November 10, 1884.—*Osler, J. A.*]

UPON an interpleader application, made to the Master in Chambers by a sheriff, the execution creditor abandoned after the claimant's affidavit had been filed.

The Master made an order barring the execution creditor, but without costs to the sheriff or claimant, for the reason that, although it was alleged in the affidavits that special directions had been given to the sheriff by the execution creditor as to the goods which the former was to seize, yet it appeared that the special directions were not given in contemplation of an adverse claim.

*Aylesworth*, for the sheriff and claimant, now appealed from the Master's direction as to costs.

*Clement*, for the execution creditor, contra.

OSLER, J. A.—The question is, as to the right of the sheriff and the claimant to costs of the interpleader application, when the execution creditor has abandoned after the claimant's affidavit has been filed.

I understand that the duty of the sheriff holding an execution against the goods of the judgment debtor is to seize such goods as he can find. He is not entitled to any other instructions than those given him by the writ

itself, and must act upon his own judgment in executing it against the property of the execution debtor: *Smith v. Keal*, 9 Q. B. D. 340.

If he returns the writ *nulla bona* he runs the risk of an action being brought against him for a false return; while, if he seizes, and an adverse claim is made, he can always put himself in a position to obtain the relief and protection afforded by the Interpleader Act.

The execution creditor does not, by delivering an execution to the sheriff, undertake to indemnify him against the costs and damages he may incur by seizing the wrong person's goods, and he does not become a trespasser merely by accepting and trying an issue under an interpleader order, though he fails to prove that the goods were those of the execution debtor: *Kennedy v. Patterson*, 22 U. C. R. 556; *Woollen v. Wright*, 1 H. & C. 554.

When the sheriff has seized merely in supposed obedience to the writ, the settled practice, I think I may say, is, that the execution creditor is not bound to determine what course he will adopt until the sheriff interpleads, and he has had an opportunity of seeing the claimant's affidavit and the nature of his title: *Walker v. Olding*, 1 H. & C. 621, 9 Jur. N. S. 53; *Canadian Bank of Commerce v. Tasker*, 8 Pr. R. 351.

He may then decline to accept an issue, and is not liable to pay the costs either of the claimant or of the sheriff, for his answer to each of them—one complaining of the seizure, and the other of its consequences—is, "Thou canst not say *I* did [it]."

But when, in addition to the writ, special directions are given to the sheriff to seize particular goods, the rule is, I think, equally well settled, that if the execution creditor abandons after interpleader proceedings have been taken, he must pay the sheriff's costs. I think there is no such limitation to the rule as was contended for, viz.; that the special directions must have been given in contemplation of an adverse claim. Such directions are sufficient to make the attorney liable as a trespasser, and the client



too if they were given by his authority: *Smith v. Keal*, 9 Q.B.D. 340. So far, however, as the sheriff is concerned, I do not see how he can be expected to look beyond the attorney's instructions, whether the claim is anticipated or not. Therefore, in the present case, if there had been nothing else before me than there was before the learned Master in Chambers, I should have thought, with great respect, that the practice entitled both parties to their costs against the execution creditor, a special direction to seize the goods having been sworn to.

A further affidavit has, however, now been produced, which, so far as it is material, I think I ought to permit the execution creditor to read, and I will say why. The sheriff's motion was based upon an affidavit, stating, *inter alia*, "That the said goods seized by me were seized by instructions of the said Messrs. ———, the plaintiffs' solicitors.

To this general statement affidavits in answer were filed, sworn on the 23rd October, denying that any such instructions had been given. So that the sheriff's affidavit was fully met in the only sense in which it required to be met or called for an answer, assuming that no instructions had been given.

When these affidavits were produced the motion was enlarged until the 31st October, and on that day further affidavits were produced from the sheriff and his bailiff, the latter of whom swore to an interview with one of the plaintiff's solicitors on the 10th September, as the one at which the instructions to seize had been given, and that he was the officer who received them. As the case before the learned Master in Chambers did not turn upon the point whether a direction had in fact been given or not, but whether it had been so given in view of a contemplated claim, it did not become necessary to answer the last affidavit in which for the first time the real facts were disclosed. But, as I think the case must turn upon the question whether there was a direction to seize in point of fact, it is clear the execution creditor ought to have an

opportunity of answering the affidavits last filed, and an affidavit is now produced in which, amid a great deal of impertinent and scandalous matter, there is a clear and distinct denial of the conversation sworn to by the bailiff.

As the case then simply stands with the special direction sworn to by one party and denied by the other, and therefore not proved, I can only assume that the sheriff acted under the writ. The order must therefore be affirmed, and the appeal dismissed. As that result proceeds upon the additional material before me, there will be no costs. I should not have given them in any case, looking at the affidavit I have referred to, in which the sheriff's officer is accused of intemperance, misapplication of moneys received by him, and which otherwise contains much that is irrelevant and beside the merits of the case.

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## MUNSIE V. LINDSAY.

*Will—Devise of land subject to annuity and life estate—Effect of.*

A testator gave his son A. his board and lodging and £5 a year during his natural life. He devised to his eldest son a portion of his real estate on condition of his paying A. £3 out of the £5 a year. He further devised another portion of his real estate to his wife for her life, and then to his son R., on condition that R. should pay the balance, £2 a year, and keep his son A. in board and lodging during his natural life. *Held*, that the annuity to A., though chargeable against different parties, was not separable. (2) That the intention of the testator was to provide for A. from the time of the testator's death, and that R.'s land was chargeable with such £2 a year, and the board and lodging from that time, notwithstanding the tenancy for life.

[January 8, 1885.—*Master-in-Ordinary.*]

AN enquiry as to the validity of charges and legacies on certain lands of the testator. The case is reported 1 O. R. 164, and also as to another reference *ante* p. 173. The general facts appear in the judgment.

*R. S. Cassels*, for plaintiffs.

*W. Barwick*, for defendant.

MR. HODGINS, Q. C., MASTER-IN-ORDINARY.—The testator by his will provided for his son Adam in these words:

“Sixth. I leave and bequeath to my son Adam his board and lodging with £5 per year during his natural life, to be given as hereinafter mentioned.”

He then devised certain real estate to his eldest son Alexander on condition of his paying (among other charges,) to Adam £3 a year during his natural life.

Alexander's estate vested in him on the death of the testator; and as to him this annuity to Adam became payable from the period of vesting.

In another clause the testator devised to his wife as tenant for life certain other real estate; and after her death he devised such real estate to his son Robert, on condition that he should pay £2 a year to Adam, and “keep him, my son Adam, in board and lodging during his natural life.”

The testator died in 1854, and the tenant for life in

1874; and it is contended that this latter legacy to Adam did not become chargeable on Robert's land until after the death of the tenant for life.

The annuity in favour of Adam, though chargeable against different parties, is not separable. The intention of the testator as indicated by his will was to provide for his son Adam from the time of his (the testator's) death; and the will therefore must be so construed as will effectually carry out the intention of the testator in favour of this legatee as against the devisees of the real estate. This intention is not to be defeated, because before Robert's enjoyment of the estate a tenancy for life was carved out of it for the benefit of the testator's widow; while Alexander's enjoyment of his portion of the testator's realty vested in him subject to this charge immediately on the death of the testator.

For these reasons this legatee, Adam, must, I think, be held to have been entitled to his board and lodging and the £5 a year from the testator's death. And Robert and those claiming under him, by accepting the devise, must be held to have taken this portion of the testator's real estate *cum onere* from the same time.

Even in doubtful cases a legacy like this should be construed so as to make it as effectual as possible to the object of a testator's bounty.

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## RE BOLT AND IRON COMPANY.

## HOVENDEN'S CASE.

*Winding up insolvent company—Allotment of stock—Proceedings against contributory—Costs—Delegation of powers.*

Under an order for winding up an insolvent company, under 45 Vic. c. 23 D., the proceedings to enforce the liability of shareholders must be taken by the liquidator, and not by the petitioner for the winding-up order.

When proceedings are so taken by the liquidator, and are unsuccessful, costs may be awarded against him personally, leaving him to apply to be allowed such costs out of the assets of the company.

A contract between a company and a person who makes application for shares must be dealt with as ordinary contracts: there must be an offer by the one to take shares, and an acceptance of such offer by the company.

One H., subscribed for shares in a company, but no shares were formally allotted to him by the directors. Calls were made by the general manager, and notices of such calls were sent by the secretary to, and received by H. but the calls had never been authorized by the directors. *Held*, that the unauthorized acts of the officers named could not be construed to be an allotment, or a notification of an allotment of stock, so as to bind the company or prove an acceptance of H.'s subscription for stock.

A board of directors cannot delegate to its officers or to third parties its statutory powers to allot stock, or make calls.

[October 18th, 1884.—*The Master-in-Ordinary.*]

THIS was a reference to wind up the above company under the Dominion Insolvent Company's Act, 1882.

*Laidlaw*, for the liquidator and petitioner.

*Lash*, Q. C., for Hovenden.

MR. HODGINS, Q. C., MASTER-IN-ORDINARY.—In proceeding to wind up the business of this company, a list of parties alleged to be contributories has been brought in, and an application is now made to have one R. J. Hovenden declared to be a shareholder in the company, and liable as a contributory in respect of \$1000 worth of shares subscribed for by him in the capital stock of the company.

There is evidence of a subscription under a power of attorney given by Hovenden to one Moodie, a director of the company. There is also some evidence which tends to show a revocation of the power prior to the subscription



by Moodie, but the evidence was not pressed. No evidence has been given of any allotment of stock to Hovenden by the board of directors, or of any notification of allotment.

The liquidator relies upon certain notices of calls received by Hovenden subsequent to his subscription, as showing a *prima facie* case of allotment of stock. These alleged calls it appears were made by the general manager of the company and notified by the secretary, without any authority or warrant from any resolution, by-law, or other act of the board of directors.

The Companies Letters Patent Act, R. S. O. ch. 150, authorizes the directors (sec. 29,) to make by-laws, regulating the allotment of stock, and the making of calls thereon; and provides (sec. 34,) that if the letters patent of the company make no definite provision, the stock of the company, so far as it is not allotted by the letters patent, shall be allotted when and as the directors, by by-law or otherwise, ordain.

The letters patent in this case make no provision regulating the allotment of stock; and no by-laws of the company have been proved before me.

In *Pellatt's Case*, L. R. 2 Ch. 527; Lord Cairns, L.J., held that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there can be no contract. And in *Gunn's Case* L. R. 3 Ch. 40, Sir John Rolt, L. J., held, that the contract between a company and a person who makes application to become a member, must be dealt with according to the principles which apply to ordinary contracts: there must be the consent of the two parties to the contract,—an offer by one and an acceptance by the other, or something which satisfies the Court, either by words or conduct, that the offer has been accepted to the knowledge of the person who made the offer.

There is no evidence that the directors had authority to delegate, or in fact did delegate to the officers named, the statutory powers vested in them to allot stock and to make calls. The general scope of the authority of these officers

is limited to the ordinary conduct of the routine business of the company. Unless expressly authorized, directors can only delegate to their officers those duties which belong to the ordinary commercial business of the company: *Cartmell's Case*, L. R. 9 Ch. 691. Nor can they delegate to them or to third parties their statutory powers of allotting shares or making calls. Under a similar power to the one possessed here, a board of directors passed a resolution delegating the allotment of shares "to the discretion of the manager and two private directors." The Court held that the directors had no such power; that being the delegates of the shareholders the maxim, *delegatus non potest delegare* applied; and that an allotment made by these delegates was not binding: *Howard's Case*, L. R. 1 Ch. 561.

It cannot therefore be held that the act of the general manager in making these unauthorized calls, nor the act of the secretary in notifying this party of such unauthorized calls, was such an allotment or notification of an allotment of stock by the directors as would bind the company, or make this party a shareholder.

A question has been raised whether these proceedings to enforce the liability of the shareholders should have been taken by the liquidator or the petitioner.

The English and Canadian Acts are substantially the same as to the powers of the liquidator, (Imp. Act 25 & 26 Vic., ch 89, sec. 94-5; 45 Vic. ch. 23, secs. 33-35 D.) And it would appear from *re Duckworth*, L. R. 2 Ch. 578, approved in *Waterhouse v. Jamieson*, L. R. 2 H. L. Sc. 29, that in winding-up proceedings, the liquidator represents the creditors only because he represents the company, and that through the company so represented the rights of the creditors are to be enforced. Other cases shew that proceedings against contributories are taken by the liquidator by his name of office on behalf of the company, and not by the petitioner on whose application the winding-up order is made.

The statute (sec. 34,) directs the liquidator to take into his custody all the property, effects, and *choses in action*,

to which the company is entitled; and (sec. 35) to bring suits in his own name as liquidator, or in the name or on behalf of the company. The proceedings to enforce the liability of contributories are therefore properly taken by the liquidator and not by the petitioner.

Having found that Hovenden is not a contributory, the proceedings against him must be dismissed, with costs, which I award against the liquidator personally, leaving him to apply to be repaid the same out of the assets of the company as he may be advised: *Ferrar's Case*, L. R. 9 Ch. 355. A similar rule applies in insolvency proceedings: *Ex parte Angerstein*, L. R. 9 Ch. 479.

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### RE BOLT AND IRON COMPANY.

*Sale by liquidator of assets of a company—Agreement to buy at unascertained rate—Ambiguous contract—Sales under Dominion Insolvent Companies Acts.*

The liquidator of an insolvent company brought in for approval an agreement with certain parties for the sale to them of its assets at a price equal to twenty-five cents on the dollar of the claims of the creditors of the company "as may be admitted or adjudicated," in addition to the costs of the liquidation proceedings to be taxed by the Taxing Officer, and the remuneration of the liquidator to be settled by the Master. There was no mode of admitting or adjudicating on such claims provided in the agreement. The agreement was opposed by certain creditors, and thereupon the proposed purchasers withdrew from it.

- Held*, (1) That if the creditor's claims were to be admitted by and between the parties the agreement was conditional, and the purchasers by withdrawing before ascertainment left the agreement imperfect.  
 (2) That by not providing a mode of admitting or adjudicating upon the creditors' claims the agreement was ambiguous, and parol evidence would have to be adduced to explain it.  
 (3) That for these reasons the agreement was incapable of being enforced, and could not be approved.

*Quere* whether an agreement to purchase the assets of a company at a certain rate in the one dollar of the unascertained claims of the creditors of such company would be valid.

The Chancery practice in sale cases applies to the sales under the Dominion Insolvent Companies Act; and under such practice it is usual before offering property for sale to have an inquiry whether a sale by auction, or under private contract, would be the most advantageous to the estate. When a sale by private contract is directed, an affidavit of the actual value of the property should be produced, so that such value may be compared with the price offered.

THIS was an application by the liquidator to approve of an agreement made by him with certain proposed purchasers of the assets of the insolvent company.

The general facts of the case appear in the judgment.

*Bain*, Q. C., and *Laidlaw* for the liquidator.

*E. Martin*, Q. C., *Falconbridge*, and *Hands*, for certain creditors, contra.

*Cassels*, Q. C., for the purchasers.

MR. HODGINS, Q. C., MASTER-IN-ORDINARY.—The liquidator brings in for approval an agreement made by him with certain parties for the sale of all the assets, real and personal estate and effects of this company, subject to certain admitted as well as disputed liens (set out in the agreement) “at a price equal to a composition of 25c. in the \$1 of the claims of the creditors of the Bolt and Iron Company as may be admitted or adjudicated,”—payable by instalments, and to be secured by the bond of a surety agreed upon. The proposed purchasers also agree to pay the costs, charges, and expenses incurred and to be incurred in the liquidation proceedings, and in carrying the agreement into effect; and also the disbursements of and allowance to the liquidator, less the moneys heretofore realized out of the assets.

The application is supported by the affidavits of the liquidator, his partner, and one of a committee of creditors appointed to assist the liquidator, which affidavits deal only with the advisability of selling these properties by private contract rather than by public auction.

In approving of this agreement the liquidator says: “I have made my estimates to the best of my ability on the papers and evidence before me, and I am of the opinion that it is in the general interest of the creditors to carry it into effect, and that it ought to be sanctioned.”

The application is opposed; and the proposed purchasers appeared before me, and after hearing of such opposition stated that they withdrew from the agreement and repudiated it.



Preceding this agreement a meeting of creditors, after various negotiations for a sale by private contract, agreed upon a sale by auction, subject to reserved bids. It is stated that the agreement now brought in would be approved of if submitted to another meeting of creditors; but in view of the present opposition to it, I think it proper to dispose of the agreement as it stands, without putting the estate to the cost of another meeting.

The practice under the English Winding-Up Act, 1862 (r. 32) provides that the property of an insolvent company is to be sold in the same manner as in the case of a sale under a decree or order in Chancery. And by sec. 98 of the Dominion Act of 1882, until forms, rules and regulations are made, the forms and procedure are as nearly as may be to be those of the Court in other cases.

The ordinary Chancery practice in sale cases is, first to have an enquiry whether a sale by auction, or by tender, or by private contract, would be the most advantageous to the estate, and then to offer the property for sale by the mode adopted.

And, even in a pending suit where no decree has been made, it is proper for the trustees who are parties to such suit to obtain the sanction of the Court to their exercise of powers of sale and leasing *Turner v. Turner*, 30 Beav. 414.

Assuming that a sale by private contract would have been directed, if brought up in the regular way, the practice requires more than has been proved on this application. *Pimm v. Insall*, 10 Ha. App. L, may be referred to as shewing what is the usual evidence in such cases, viz.: a sufficient affidavit of the actual value of the estate as compared with the price offered by the proposed purchaser.

Here there is no affidavit shewing the value of the assets of the company proposed to be sold, nor any estimate of the amount which the proposed purchase money would realize. All estimates of value, proposed price, and probable amount of debts, are withheld.



But more formidable difficulties stand in the way of the approval of this agreement. It provides that the purchase money is to be 25c. in the \$1 of the claims of creditors as may be "admitted," or "adjudicated." These terms are ambiguous. By whom are the claims of creditors to be "admitted?" Taking the agreement by itself, and reading it as between the vendor and the proposed purchasers, it would mean : admitted by or between themselves. If so, then as the proposed purchasers repudiate the agreement, and decline to investigate or admit the creditors' claims, the agreement is not enforceable : *Darbey v. Whittaker*, 4 Drew. 134. If the claims are to be "admitted" by others than the parties to this agreement, then there is an ambiguity, for the parties who are to admit the claims are not indicated, nor is their appointment provided for. And in such event, still taking the agreement by itself—on what ground can it be contended that the proposed purchasers are to have no voice in the naming of the parties who are to make the "admissions" which are to determine the amount of the purchase money they are to pay for this property?

So in regard to the term "adjudicated." The agreement names no tribunal. It may be that the tribunal before which the winding-up proceedings are being taken, was intended; but it is not so provided.

From what was contended before me, it is clear that neither party agrees to the other's interpretation of this agreement, and that parol evidence would have to be resorted to; in which case the difficulties pointed out in *Stretton v. Stretton*, 24 Gr. 20, would apply, and the contract could not be enforced.

Independently of these provisions, the reference to the Taxing Officer, "to tax the costs," and to the Master "to settle the liquidator's remuneration," both of which items are to form portions of the purchase money, brings this proposed agreement within the class of cases where the price is to be ascertained by a reference to others.

"Where" (says Mr. Justice Fry) "the contract specifies a way of ascertaining the price, the contract is conditional

till the ascertainment, and is absolute only when the price has been determined. In case of default in this respect the contract remains imperfect and incapable of being enforced:" *Fry* on Specific Performance, 2nd ed., p. 151.

These observations apply to this case. The proposed purchasers by withdrawing while the contract is conditional, and, in effect, refusing to join in the proceedings to determine the amount of the purchase money, leave the contract imperfect, and therefore incapable of being enforced. An approval of such a contract would involve the liquidator in a profitless law suit.

The only agreement which seems to partake of some of the characteristics of the one before me, is that referred to in *Re Gaudet Frères Steamship Company*, 12 Ch. D. 882, where the purchaser agreed to purchase the assets at a price equal to 6d. on the £ of the creditors' claims. But in that case the agreement provided that the sum so to be paid as the composition to the creditors, was to be ascertained by the chief clerk; and yet the purchaser—after paying the composition so ascertained, and a portion of the costs—was allowed to contest the validity of the compromise and agreement.

This agreement cannot therefore be approved. It is not a case for costs to or against any of the parties.

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## CANADIAN BANK OF COMMERCE V. FORBES.

*Liens on real estate—Registry Act—Mortgagee's claims.*

Under a judgment for redemption obtained by an execution creditor of the mortgagor, the mortgagee who held the title under a deed absolute in form, brought into the Master's office with his account certain orders signed by the mortgagor, directing him to pay to the parties named in them, any surplus moneys in his hands after paying his mortgage. The mortgagee did not accept them, but entered them in his real estate ledger, and they were not registered.

*Held* (1), That such mortgagee could not claim to be allowed these orders in addition to his mortgage, not having accepted or paid them; nor could he be looked upon as a trustee holding the lands in trust for the holders of such orders. (2) That the orders operated as equitable charges or liens on the mortgagor's interest in the lands, prior to the receipt by the sheriff of the plaintiffs' *fi. fa.* lands, and that such lien holders should be made parties in the Master's office, and prove their claims in their own right.

[January 8, 1885.—*The Master-in-Ordinary.*]

A REFERENCE in an action for redemption at the suit of a judgment creditor of the mortgagor.

*Walsh*, for the plaintiffs.

*D. Black*, for the defendant Forbes.

MR. HODGINS, Q. C., MASTER-IN-ORDINARY—This is a judgment for redemption and sale in a mortgage case. The deed held by the mortgagee Forbes, though absolute in form, is declared to be a mortgage. Under a direction to bring in his account, this mortgagee brings in various orders on him signed by the mortgagor, one of which may be referred to as a sample of the others, and is as follows :

"When I sell lot, \* \* and when you receive the purchase money thereof, and when you have retained thereout the moneys I owe you, which moneys to this date do not exceed \$750, please to pay to the order of \* \* the sum of \$125, to whom I give a lien on the purchase money, and the said lot, subject to your lien thereon."

The mortgagee states that when these orders were presented to him he entered them in his real estate ledger, but

that he did not accept them, not wishing to run the risk of any personal liability.

None of these orders are registered against the lands. The lands have not been sold, and the mortgagee's rights are now controlled by this judgment for redemption, which has been obtained by a judgment creditor of the mortgagor.

Had the mortgagee sold, or had the proceeds of these lands come into the hands of the mortgagee, I think these orders would have operated as an equitable lien or charge on the moneys held by him beyond the amount due on his mortgage: *Farquhar v. City of Toronto*, 12 Gr. 168.

But as the mortgagee has not paid, nor in any way made himself personally liable on, these orders, the case must be looked at in the light of the cases which regulate charges or contracts affecting real estate. The moneys covered by these orders are not due to the mortgagee, nor can he be looked upon as a trustee holding these lands in trust for the holders of these orders. So far as he is concerned they cannot affect him unless the purchase money comes into his hands. And now, before any sale of the lands, an execution creditor of the mortgagor intervenes with a judgment which gives such creditor the right to redeem by paying what is due to the mortgagee on his mortgage security.

The plaintiff's execution binds the lands of the debtor or whatever interest he had in them at the date of the delivery of the *fi. fa.* lands to the sheriff: *Auldjo v. Hollister*, 5 O. S. 739; *Burnham v. Simmons*, 7 U. C. R. 196; *Thirkell v. Patterson*, 18 U. C. R. 75. And by R. S. O., ch. 49, sec. 11, the equitable interest of the debtor, which cannot be sold under legal process, may be ascertained and sold to satisfy the plaintiffs' execution.

Up to the date of the sheriff's receipt of the writ against his lands, this mortgagor had a disposing power over these lands and their proceeds; and so long as any instrument under the Registry Act did not intervene, he could validly contract to sell or charge his interest in them in any way allowed by law. And such contracts or charges would be valid, unless cut out, or "adjudged fraudulent and void,"

by the registration of some subsequent instrument affecting the lands, as provided in the Registry Act.

The orders produced in this case are equitable assignments of, or liens on, the purchase money, and operate as a charge on the lands or their proceeds in favour of the holders. The several persons in whose favour they are drawn may be made parties defendants to this action, and such of them as have orders dated prior to the date of the receipt by the sheriff of the plaintiffs' execution against the lands of the defendant, may claim in their own rights the charges created in their favour.

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### LANGTRY V. DUMOULIN.

*Certificate of taxation—Rules 437, 448—O. J. A.—Appeal.*

Upon the issuing of a certificate of taxation, a taxing officer is *functus officio*, and it is only when the Court requires information that he should further certify.

An appeal from a certificate of taxation will not lie until the certificate has been filed.

Under Rules 437 and 448, O. J. A., a taxing officer may issue a certificate of his ruling on any points in dispute pending the taxation, and upon it an appeal may be had, but his right to issue such certificate ceases when he has issued his final certificate.

[November 17, 1884.—*Boyd, C.*]

UPON an appeal by the defendant Dumoulin from the certificate of one of the taxing-officers, it was objected by the other defendants (the respondents in the appeal) that the certificate had not been filed. The facts further appear in the judgment.

*Arnoldi*, for the appeal.

*Alfred Hoskin*, Q. C., and *E. Douglas Armour*, contra.

BOYD, C.—The practice governing appeals from the taxing-officers at Toronto is generally the same as that governing appeals from the Master. The certificate of taxation



is a report, though one of those classes of reports which do not require confirmation before being acted upon: *Re Ponton*, 15 Gr. 356; *Fenton v. Crickett*, 3 Madd. 496; *Graham v. Anderson*, 2 Ch. Ch. 303.

By a practice, dating back to 1692, every report or certificate of this kind (though not requiring confirmation) must be filed before any proceedings grounded upon it can be taken. This implies that until it is filed no proceedings can be taken under it, or for the purpose of complaining of it: *Eyles v. Ward*, 2 P. W. 516; *Re Campbell*, 3 DeG. M. & G. at p. 588. The filing of it is the formal method required by the practice of authenticating to the Court what the officer who exercises the delegated functions of the Court has done. This ancient practice is continued by R. 445 of the Judicature Act. In the present case the taxation was completed, and the taxing-officer signed his certificate of the result on the 14th of October. This has not been filed. On the 15th of October the taxing-officer issued a certificate to the present appellant of the objections which had been made to his taxation, upon which this appeal is based. This is an erroneous practice, as the officer should not certify *ex parte* in regard to hostile proceedings, at the instance of either party, after he has made his report. Upon the making of his report or certificate, he is *functus officio*; and it is only when the Court requires to be informed upon any matter that he should further certify.

No doubt he may, by virtue of Rules 437 and 448, issue a certificate of his ruling on any points in dispute pending the taxation, and upon that an appeal will lie, as in analogous cases of Masters' separate or special reports, but this right ceases when he has issued his final certificate of taxation. In the present case the proper course would have been to include in his certificate the points of objection to his taxation, and then the appeal would have been for an order to review that certificate upon the matters objected to under R. 449: *Daniell's Prac.*, 6th ed., vol. 2, p. 1255, 1256; *Kenrick v. Wood*, W. N. 1870, p. 216; *Seton on Decrees*, 4th ed. vol. 1, p. 626,

As the practice has not been hitherto settled under the Judicature Act on this minute point, I do not feel disposed to give effect to the preliminary<sup>1</sup> objection so as to deprive the party of his appeal. I will now give leave to the appellant to file a duplicate certificate of taxation (see G. O. Ch. 254) *nunc pro tunc* upon payment of ten shillings costs to both respondents, and the appeal can be brought upon that and the certificate of the Master's ruling already filed.

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### SWEETMAN V. MORRISON.

*Interpleader—Sheriff—Security for costs—R. S. O. ch. 54, sec. 10.*

Sec. 10 of the Interpleader Act, R. S. O. ch. 54, does not place a sheriff in a more advantageous position than an ordinary suitor, and the fact that a claimant is a married woman and in financial straits, is not a ground for ordering security for the sheriff's costs.

[November 18, 1884.—*Boyd, C.*]

AN appeal by the claimant in an interpleader matter from so much of the interpleader order made by the Master in Chambers as directs the claimant to give security for the sheriff's costs.

The facts appear in the judgment.

*H. J. Scott*, Q. C., for the appellant.

*Aylesworth*, for the sheriff, and

*Shepley*, for the execution creditor, contra.

BOYD, C.—Section 10 of the Interpleader Act, R. S. O. ch. 54, authorizes security to be ordered for the sheriff's costs from either or both the parties, *i. e.*, as well the party who issued the process as the party making the claim. Before this provision I was not referred to any instance, nor do I know of any, where the sheriff obtained

security for his costs. It was and is customary in proper cases to order security as between the parties to the interpleader, but this section intends a further protection to the sheriff, who is not in the usual sense a party litigant. Still I cannot read the Act as placing the sheriff in a more advantageous position than an ordinary suitor. In all cases where, according to the well understood practice, security would be ordered as between plaintiff and defendant, there is the power to make a like order for security for the sheriff's costs under the Act. It is not a ground for ordering security that a plaintiff is in needy circumstances if he is within the jurisdiction. Such is the claimant's position here. The only reason alleged for requiring security for the sheriff's costs was, that she was a married woman and in financial straits. I regard such an impediment on her claim as wrong in principle. It was not contended that the order was supportable under Rule 97 of the Judicature Act, probably because by Rule 2 the practice as to interpleader is not affected by these rules. I am not disposed to interfere with the direction as to paying possession money in any event by the claimant for the period of delay occasioned by her claim.

The costs of this appeal should go in any event to the claimant.

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## RE ARMOUR—MOORE V. ARMOUR.

*Administration limited—Foreign testator—G. O. Chy. 638.*

Where a testator dies out of the jurisdiction of the Court an administration order will not be granted, unless it is clearly shewn that there are no personal assets here in respect of which ancillary letters probate could be obtained.

An administration of the real estate only may be had in a very special case, but should be sought by action and not summary application.

[November 19, 1884.—*Boyd, C.*]

A motion for an administration order, made under the state of facts appearing in the judgment.

*Justin*, for the motion.

*Masten*, contra.

BOYD, C.—The testator died in Michigan, where his will was found by the defendant, his executor, but it does not appear that representation has been obtained to his estate in this country. The suggestion is, that there are no personal assets here, and the administration is sought for the purpose of getting at the lands to pay creditors. The practice of the Court is opposed to the success of the motion unless, for one thing, it is very clearly established that there is no personal property of the deceased within this jurisdiction in respect of which ancillary letters probate could be obtained: *Jauncy v. Sealey*, 1 Vern. 397; *Tyler v. Bell*, 2 M. & Cr. 89.

The affidavits are silent upon this point, and the notice of motion seeks administration of the personal estate. It is possible in this country to have an administration of the real estate without a general administration in a very special case, but that should be made upon pleadings, and not by way of summary application: *Dey v. Dey*, 2 Gr. 149. Other difficulties may arise in this case as to the disposition of the personal assets in the States, which should be first applied to satisfy the claims of American

creditors, of whom the plaintiff is one. If the plaintiff elects to proceed by action, the matter may stand enlarged for a month for him to do so, and all costs will be reserved—if not the motion will be refused, with costs.

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## DUNSFORD V. CARLISLE.

*Discovery—Privilege—Answers tending to criminate—13 Eliz. ch. 5.*

*Held*, that the penal provisions of the statute 13 Eliz. ch. 5, afford no excuse for a refusal by a defendant in an action brought to set aside a fraudulent conveyance to answer questions put to him regarding the fraudulent transaction.

[November, 24, 1884.—*Boyd*, C.]

THE action was brought by a creditor of the husband against the husband and wife, to have certain conveyances by which certain lands had become vested in the wife declared to be fraudulent and void, and to have it declared that the wife held the said lands as a mere trustee for the husband, and for execution out of the said lands.

An appointment and subpœna had been duly issued and served by the plaintiff, under which it was sought to examine the defendants in the usual way for discovery.

The defendants attended upon the appointment, but refused to submit to examination on the advice of counsel, alleging that their answers might tend to subject them to the penal provisions of the statute 13 Eliz., cap. 5.

*Shepley* moved for an order to attach the defendants, or to compel them to attend for examination at their own expense, or in the alternative to strike out their defence. He contended that the penal provisions of the Statute of Elizabeth afforded no excuse for refusing to make discovery. He cited *Bunn v. Bunn*, 12 W. R. 561; *Kerr* on Discovery, p. 154; *Hare* on Discovery, 2nd ed., p. 109.



*Smoke* showed cause, and cited *Wich v. Parker*, 22 Beav. 59; *Michael v. Gay*, 1 F. & F. 409; *Villeboisnet v. Tobin*, L. R. 4 C. P. 184; *Hare* on Discovery, 2nd ed., p. 101.

*Shepley*, in reply. *Wich v. Parker* did not decide the point in question. *Michael v. Gay* contains the merest *dictum* on the part of Mr. Justice Willes at *Nisi Prius*, expressed apparently without any reference to the authorities, and is not binding upon this Court. On the other hand, *Bunn v. Bunn* is a decision of the full Court, founded upon a consideration of the authorities.

BOYD, C.—This question has not, so far as I am aware, been raised heretofore in this country. I shall follow *Bunn v. Bunn* rather than the *Nisi Prius* case of *Michael v. Gay*. The defendants must attend for examination at their own expense, and pay the costs of the abortive examination and of this motion in any result of the cause.

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## MCLAREN ET AL. V. MARKS ET AL.

*O. J. A.—Rules 107, 108—Third parties—Appeal from Judge—Rule 414.*

In an action for the non-delivery of coal, one of the defendants gave notice to S. & M., under the first part of Rule 107 and Rule 108, of the action, and that he claimed contribution from them to the extent of one half of any sum recovered against him on the ground that they were co-partners in the transaction, &c. S. & M. appeared to this notice, and the Master in Chambers subsequently made an order giving them leave to appear, and directing that they should be bound by any judgment against the said defendant: *Held*, on appeal from the order of OSLER, J. A., setting aside the order of the Master, that the latter order had been properly made.

The decision appealed from was given on the 14th, and the notice of appeal on the 26th November, the first day of Michaelmas Sittings being the 17th November: *Seemle*, that this was an appeal from a Judge, and not a substantive motion to rescind his order, and if so, and Rule 414 was to govern, the appeal was too late; but, *Held*, even so, that the Court would extend the time, as the merits were with the appellant.

[January 6th, 1885.—*The Divisional Court, Q. B. D.*]

THIS was an appeal from an order of Osler, J. A., setting aside an order of the Master in Chambers.

The action was on a written agreement between the defendant Marks and one Cunningham; Cunningham was acting for himself and his co-plaintiff, and Marks was acting for himself and his co-defendant Burke, as alleged in the statement of claim. Under the contract in question Marks was to deliver to Cunningham certain quantities of coal lying at Port Arthur, at certain prices and on certain terms; and it was alleged that although the plaintiffs paid for the coal, they did not receive the quantity or the quality of coal agreed for, and they claimed damages for the default.

The action was begun on the 6th of March, 1884, and the statement of claim was filed and delivered on the 29th of September, 1884.

On the 9th of June, 1884, the solicitors for the defendant Marks gave notice to John Shields and John McDonald of this action having been brought against Marks and Burke, and that Marks claimed to be entitled to contribution from them (Shields and McDonald) to the extent of one-half of any sum the plaintiffs might recover against him (Marks),

on the ground that they, Shields and McDonald, were partners with the defendants in the transaction out of which the sale arose, and that the loss, if any, should be borne equally by all the partners; and that if they wished to dispute the plaintiffs' claim in the action, they must appear within eight days after the service of the notice upon them, and in default of their appearing they would not be entitled, in any future proceedings between the defendant Marks and them, to dispute the validity of the judgment in the action, whether obtained by consent or otherwise.

On the 17th of June, 1884, Marks delivered his statement of defence and counter-claim. He denied that he had not delivered the coal to the plaintiffs, and said the plaintiffs had not paid for the coal; that they owed \$961.93 upon it, with interest at seven per cent. from the 1st of February, 1883; and he counter-claimed for that sum.

On the 26th of June, 1884, the solicitor for Marks made affidavit that Shields and McDonald had appeared to the third party notice; that they were served with the notice because they were partners with the original defendants in the coal transaction, about which this action was brought, and that the deponent believed the third parties were jointly interested with the defendants in resisting the plaintiffs' claim; and he believed it would tend to the settlement of accounts of the partnership if the weight and price of the coal sold to the plaintiffs were determined in this action in a manner that would be binding between the defendants and the third parties.

On the 30th of October, 1884, the Master in Chambers made an order that the third parties should be at liberty to appear, &c.

The order of the Master in Chambers was appealed from, and the appeal was heard before Osler, J.A., who gave judgment thereon as follows:

The judgment states that after the third parties had appeared an application was made, under Rule 111, for directions as to the mode of having the questions in the action determined. The motion was opposed by the third parties, on the ground that the case was not one in which

the defendants could properly serve a notice under the third parties' orders, or could not do so without first obtaining leave. \* \* \*

It was objected by the defendants that as the third parties had appeared they were precluded from contesting the propriety of the notice. This was, however, expressly held not to be the case in *Benecke v. Frost*, 1 Q. B. D. 419, 421. In the recent case of *Corrie v. Allen*, W. N. 1883 p. 65, Lord Justice Lindley, speaking of the rules of 1875, on which our own are founded, said that the third parties' clause had only been found efficacious in very simple cases.

The present case is one in which I am strongly of opinion the plaintiff should not be embarrassed by the presence of the third parties in the action, and that the latter should not be called upon to take part in the defence.

The defendant Marks' case, as put forward in the notice, is, that the third parties are partners with the defendants in the transactions out of which the sale arises, and that the loss should be borne equally.

The solicitor's affidavit, the only material on which the application is founded, states merely that he is 'instructed and believes that the third parties are jointly interested in resisting the plaintiff's claim,' and that it would 'tend to the settlement' of the accounts of the 'co-partnership, if the weight and prices of the coal sold to the plaintiff are finally determined in this action.

The order made goes far beyond this, and directs that the third parties should be bound by the validity and amount of any judgment which may be recovered in the action, not against both defendants, but the defendant Marks only. The defendant Burke is apparently not a party to the application or bound by the order.

The third parties deny there is any partnership, but, apparently admitting there was a joint ownership of the coal, allege it was sold by Marks in fraud of them, and without their knowledge or consent, and that litigation is now pending in Manitoba between them on the subject.

The notice was given under the first part of Rule 107 and Rule 108, treating the case as one of contribution, and not under the second part of Rule 107, as one in which a question in the action should be determined not only as between the plaintiffs and defendants, but also as between the defendant and some other person : *Horwell v. London Omnibus Co.*, 2 Ex. D. 365-381. If, however, the third parties are right, and the coal was sold in fraud of them, or even if the coal was not sold in fraud of them, but the breach of the contract was caused by the misconduct, wrong or negligence of the defendant, the damages which the plaintiffs may recover against the latter will not form any element in settling the accounts of the joint owners or partners. Had the partnership or authority to sell been admitted the case would be different, and there might be less reason why all the joint owners or partners should not be bound as between themselves by the amount of the plaintiffs' recovery. As it is I think it has not been clearly shewn that there is any question in the action common to all parties, and therefore the order and notice should be discharged. I should have thought too that the third parties

were entitled to a more liberal direction as to costs, being left by the order to take part in what might be a very expensive litigation at their own expense.

The defendants must pay the costs of the plaintiff and of the third parties incidental to this application and appeal.

The defendants appealed to the Divisional Court, Q. B. D., from the decision of the learned Judge on January 6, 1885.

*J. R. Roaf*, in support of the appeal, referred to *MacLennan's* Jud. Act, Rule 108; *Benecke v. Frost*, 1 Q. B. D. 419; *Coles v. Civil Service Supply Association*, 26 Ch. D. 529.

*Cameron*, Q. C., showed cause for Shields. The appeal is too late; it should have been made within eight days after the order appealed from was made, and no leave was given to the defendants to make this motion after the time had expired: Rule 414. On the merits he referred to *Benecke v. Frost*, 1 Q. B. D. 419; *Horwell v. London Omnibus Co.*, 2 Ex. D., 365; *Pontipex v. Foord*, 12 Q. B. D. 152; *The Bianca*, 8 Pr. Div. 91.

*Clement*, for the plaintiffs, objected to the third parties being brought in. If they were made parties it should be subject to the terms in the case of *The Town of Dundas v. Gilmour*, 2 O. R. 463.

*Roaf*, in reply, referred to cases in *MacLennan's* Jud. Act, 2nd ed. 523, which show an appeal of this kind is treated as a substantive motion to rescind the Judge's order, and the motion need not be made within the eight days.

WILSON, C. J.—The first question is, whether the appeal from the Judge is in time. Rule 414 provides that "every appeal to the Court from any decision at Chambers shall be by motion, and shall be made within eight days after the decision appealed against, or if no Court to which such an appeal can be made shall sit within such eight days, then on the first day on which any such Court may be sitting after the expiration of such eight days."

The notice of appeal should be given for the first day of the sittings, when the eight days have expired before the



first sitting of the Court to be appealed to: *Hewson v. Macdonald*, 2 C. L. T. 348; *MacLennan's* Judicature Act, 2nd ed., 509.

The decision appealed from was given on the 14th of November, and the notice of appeal was served on the 26th of November, this Court having sat upon the 17th of that month. If the time be computed from the date of the decision on the 14th, the eight days expired on the 22nd November, and if from the first day of Term they expired on the 25th. If the rule referred to is to govern, the defendant is too late. I am inclined to think this is an appeal from the learned Judge, and not a substantive motion to rescind his order; but there are decisions that such an application may be considered as a substantive motion, and I do not desire to go counter to them. If this however, be an appeal, I should be disposed to extend the time even now in this case, as the merits of the application are, I think, with the applicant. He wants his other co-partners brought into the action with himself and his co-defendant. He must have the right to do that. He is throwing no greater burden on the plaintiffs than the plaintiffs were subjected to when they were proceeding against only two out of the four members of the partnership. He is, if anything, improving the condition of the plaintiffs by giving them a further recourse on the other partners, if the plaintiffs choose to accept the others as partners. The plaintiffs' proof will not be altered in any one respect; they may deny the third parties are partners, or they may admit it. The applicant defendant does not ask the plaintiffs either to admit or to deny the fact. The appellant might, I think, insist upon the plaintiffs' treating the third parties as partners with the now defendants. He merely says he wants the plaintiffs to be subjected to such an examination, and to such a defence as the third parties may be able to establish in favour of the applicant, the object of the applicant being to bind the third parties to such an extent and no further than they ought to be bound with respect to the plaintiffs' demand, if such third

parties are really the co-partners of the now defendants. If the third parties are not partners with the defendants, their joinder in the action cannot prejudice the plaintiffs, nor the defendants either; and if they are partners the plaintiffs should be obliged to admit their interposition in aid of the defendants, and the applicant is equally entitled to have the benefit of such interposition, and the third parties should be bound by whatever the applicant, their co-partner, if he is such a partner, is doing for and on behalf of the partnership, and if the third parties are not co-partners their joinder in the action cannot affect their rights.

It may be a question whether the third parties are partners with the defendants or not, and it seems a very proper proceeding to have them bound by what is done in this action if it shall afterwards appear they are partners.

If the third parties are confident of their position that they are not partners, they need not take any part in the action, and they can be put to no costs by their joinder. But if they are partners, why should they not be bound as between them and the defendants, so far as the plaintiffs' claim is concerned, in all respects by whatever the plaintiffs may be able to establish against the partnership? I see no reason why they should not.

If the fact be true that the third parties charge fraud, or misconduct of any kind, by the defendants as co-owners or co-partners with them in the defendants' dealing with the plaintiffs, the terms of this order do not bind the plaintiffs to settle that question between them and the third parties in this action.

In no way of viewing the case do I know how the plaintiffs or the third parties can be prejudiced by the joinder of the third parties, and I see the applicant may or will be benefited by their joinder.

It is said the terms of the order go beyond the object of the applicant in requiring the third parties to be brought in as defendants: that as the object is to bind the third parties as to the weight of the coal sold to the plaintiffs,

and the price for which it was sold to them, the order of the Master in Chambers is to bind the parties "by the validity and amount of any judgment, which may be recovered in the action against Marks," one of the defendants only, which is made another objection to the order.

The order in words does go beyond the object for which the defendant Marks desires the joinder of the third parties to be made; but it does not in fact, for the plaintiffs' make a claim for deficiency on the coal delivered, and for the inferiority of the article they got, and damages by reason thereof, and an account of sales of part of the coal which it is charged Marks made, and for loss of profits which the plaintiffs say they would have made upon the coal bargained for if it had been the quantity and of the quality represented. Now all these are matters properly claimable by the plaintiffs against all the partners, and a judgment in their favour against Marks in respect of such matters as governed by the pleadings is in effect no more, notwithstanding the wider language of the order, than the very purpose for which the joinder is desired. If it is feared that more will be claimed in any subsequent proceedings between the parties than to bind them by the prices and quantities of the coal, as represented on this application, the order may be amended to meet that objection; but I think there is no ground for any such apprehension in that respect.

Then, as to Marks being the only applicant for the joinder and the order binding the third parties by such judgment as may be recovered against him, I see no objection to it upon that ground. We know nothing of Burke in the action, excepting that he is a co-defendant with Marks. We do not know that he has appeared or pleaded, nor whether he is an assenting party to this application by Marks or not. But that can make no difference. That is no reason why one defendant may not, for his own protection, apply to add third parties. The other defendant may not choose to defend, or may be indifferent whether a recovery is had against him or not; or he may be more favourably disposed towards the plaintiffs than towards

his co-defendant; and besides, in such a case, he will share in the benefit of the joinder, if there is a benefit obtained by it, without sharing in the responsibility of it.

The motion of the defendant Marks will therefore be made absolute re-establishing the order of the Master in Chambers, and the third parties will pay the costs of the appeal to the Judge in Chambers, and of the appeal to this Court, and also the costs of the plaintiffs in the same appeals.

ARMOUR and O'CONNOR, JJ., concurred.

*Appealed allowed, with costs.*

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### MERCHANTS BANK V. MONTEITH.

*Administration suit—Jurisdiction of Master.*

In proceeding to take the accounts under an ordinary Chamber order administration, certain unsecured creditors and the administrator sought to impeach the validity of certain warehouse receipts assigned to the plaintiffs by the testator in his lifetime, and on which he had received advances.

On appeal from the Master's ruling, it was held by BOYD, C., that as the Court takes possession of the estate for the purposes of administration, the Master's office possesses all the powers requisite for the administration of the assets, and had therefore jurisdiction to try the question. And that in the case of a creditor's administration reference, any creditor had a right to resist or attack the claims of any other creditor sought to be proved in the Master's Office.

[September 25, 1884.—*The Master-in-Ordinary.*]

[November 17, 1884.—*Boyd, C.*]

THIS was an administration matter under G. O. Ch. 638, and the Master-in-Ordinary had proceeded to take the usual accounts and ascertain creditors' claims. As there were two sets of creditors, one of them being partially secured and the other of them having no security, and their respective positions being antagonistic, the Master had, in the usual way, appointed a solicitor to represent



the unsecured creditors. In taking an account of the claims of the secured creditors, evidence was tendered by the solicitors of the unsecured creditors and of the administrator with the object of shewing that certain warehouse receipts under which the secured creditors had taken away certain goods of the testator after his death, were invalid and *ultra vires*. The Master refused to admit this evidence, upon the ground that under the scope of the ordinary administration order he had no jurisdiction to try questions of fraud or of the invalidity of a document executed by the testator in his lifetime.

*John A. Paterson*, for the unsecured creditors.

*John MacGregor*, for the administrator.

*Rae, Miller, and Walter Barwick*, for the secured creditors.

MR. HODGINS, Q.C.—I have held in *Re Munsie*, 10 P. R. 98, that the Master has no jurisdiction, under the ordinary Chamber order for administration, to try questions on oral pleadings impeaching the validity of documents, which should primarily be disposed of by the Court. Nor do I think I have jurisdiction to try cases which are outside those to which G. O. 220, applies. That under such orders, the jurisdiction of the Master's Office is not co-extensive with that of the Court in trying questions which involve the validity of documents, or questions of fraud or fraudulent preference, which in ordinary cases are submitted to the regular tribunals for investigation and adjudication. I also refer to *Wiley v. Ledyard*, 10 P. R. 182.

The Master's Office is a tribunal of delegated and subordinate jurisdiction; and in this case it cannot exercise a larger jurisdiction than that possessed by the tribunal of which it is the delegate. The order in this case is made in Chambers; and but for G. O. 220, I would have no higher jurisdiction,—for the Master-in-Chambers might himself have taken the accounts of this administration without referring them to me: G. . 210.



The general rule in regard to delegated jurisdiction is, that the delegate or deputy of the Court or Judge cannot exercise a larger judicial power than that possessed by the tribunal which communicates the jurisdiction. If the delegated jurisdiction comes from the Court then the judicial powers which pertain to the Court, for the purposes of the judicial investigation, come with the delegation. If the delegated jurisdiction comes from Chambers, then only such judicial powers as pertain to Chambers come with the delegation; and can only be extended or enlarged where a Statute or Rule of Court extends or enlarges such delegated jurisdiction. The jurisdiction of the delegate or deputy is not original, but only that of the tribunal appointing him: *Broom's Legal Maxims*, 840.

A Judge in Chambers, as the delegate of a Superior Court, may exercise the functions of the Court in the same manner as the Court itself: *Smeeton v. Collier*, 1 Ex. 457. But this rule does not apply to a Judicial Officer though sitting as the deputy of the Judge.

In this case the unsecured creditors seek to contest the validity of certain warehouse receipts given by the testator to certain banks, on the grounds that such warehouse receipts are not authorized by the Banking Act, and are fraudulent and void as against the general creditors. Such an issue would not, in ordinary cases, be within the jurisdiction of a Judge in Chambers, and therefore not within the jurisdiction of his delegate or deputy.

There is nothing in G. O. 220 which can be amplified so as to vest in the subordinate tribunal of the Master the jurisdiction of the Court to adjudicate upon questions of the validity of statutory securities, such as these, or of fraud or fraudulent preference, according to the definitions of the statute or common law; or of what is *ultra vires*, according to the decisions of the Courts.

The mode of procedure and forms of pleadings for trying such issues are prescribed by legislative enactment, and such procedure and pleading have not been made applicable to the Master's Office.

I must, therefore, rule that I have no jurisdiction under this Chamber order for administration, and on oral pleadings, to try whether these warehouse receipts are fraudulent and void as against the general creditors of the testator.

The unsecured creditors and administrator appealed, and the appeal was argued by the same counsel.

The following cases were referred to: *Re Allan*, 9 P. R. 277; *Sullivan v. Harty*, 9 P. R. 500; *McDonald v. Wright*, 12 Gr. 554; *Walmsley v. Ball*, 2 Ch. Ch. R. 344; *Paynter v. Houston*, 3 Mer. 302; *Bickford v. Grand Junction R. W. Co.*, 1 S. C. R. 726; *Peacock v. Monck*, 1 Ves. Sen. 131; *In re Turner*, W. R. Aug. 1884, p. 191.

BOYD, C.—Held that the Master had the jurisdiction in question in the case of a creditor's administration reference, and that any creditor or set of creditors had a right to resist or attack the claims of any other creditor or set of creditors, sought to be proved in the Master's Office in any way whatever. The reason being that the Court has taken possession of the estate for the purpose of distribution, and the assets are to be administered by the Master, who possesses all the powers requisite for that purpose. The plaintiffs' debt is not conclusively established by the administration order, and any other creditor can attack that, and the claim of every other creditor which may interfere with his own right to be paid. The practice has been long established, and should not now be varied.

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MACDONALD v. NORWICH UNION INS. CO. AND CLARKSON v.  
FIRE INS. ASSOCIATION.

*Examination—Discovery—Rule 224, O. J. A.*

One M. having effected certain insurances in his favour, assigned one of the policies to the plaintiff, one of his creditors, and the other to one C., as trustee for the benefit of creditors. In actions on such policies—*Held*, that M. was examinable under Rule 224, O. J. A. as “a person for whose immediate benefit” the suits were prosecuted.

[December 5th, 1884.—*Rose, J.*]

THIS was an appeal from the order of the Master in Chambers, directing the examination, under Rule 224, of one Murdock McLean, not a party to the action.

*Shepley*, for appeal.

*Wallace Nesbitt*, contra.

The facts appear in the judgment.

ROSE, J.—Rule 224 reads as follows: “A person for whose immediate benefit a suit is prosecuted or defended is to be regarded as a party for the purpose of examination or production of documents.”

It appears that Murdock McLean was the party in whose favor the insurances were effected, and that becoming unable to meet his engagements, he assigned the policy in the Norwich Union to the plaintiff Macdonald, a creditor, and the policy in the Fire Insurance Association to Clarkson as trustee for the benefit of creditors.

The learned Master has decided that McLean is a person for whose immediate benefit the suits are prosecuted, and has accordingly, on the application of the defendants, ordered his examination under the above rule.

Thereupon the plaintiffs appeal.

I have given the argument of Mr. Shepley most careful consideration, and have availed myself of the opportunity of consultation with some of my learned brothers. I con-

fess I have difficulty in coming to a clear and decided opinion as to the literal meaning of the rule. There is no previous decision to assist me.

In the case of Clarkson I apprehend he is an agent appointed by the assignor McLean to collect this debt or chose in action and pay it as he, McLean, by the deed of assignment has directed.

If we put out of sight for the moment that it is almost certain McLean was and is hopelessly insolvent, that he has but little interest in the realization of his estate, except in the hope that by using every endeavour to satisfy his creditors he may obtain a discharge from the unpaid liabilities, and favorable consideration if he attempt to resume business; and if we regard him as one who is realizing his estate to pay his liabilities, and who has appointed an agent to assist him in such effort, it would seem clear he has an immediate and direct interest in the result of the suit, and that Clarkson is prosecuting it for his immediate benefit.

As to Macdonald, it is somewhat different, although, possibly, the difference is not very great.

He owes Macdonald, and is desirous of paying him; hands him over this policy; says, "Collect it and apply it in payment of the debt I owe you."

If he were solvent, and had an estate which he was endeavouring to protect, it would seem to my mind clear that the suit would be prosecuted for his immediate benefit. If the suit were successful, he would be the gainer; if unsuccessful, the loser.

Is the construction then to turn upon the fact that he has no estate out of which to answer the loss or pay the costs of unsuccessful litigation?

By way of further illustration. If a merchant in good standing, not desirous of personally suing a customer, should ask his bank to collect a note made by such customer, and under discount in such bank, and to place the proceeds, when collected, to his, the merchant's credit. Would not such action be prosecuted for the immediate

benefit of the merchant so appointing the bank his trustee to collect the note?

Then, are we to say that when a solvent person appoints another to collect a chose in action, the suit is brought for his immediate benefit; but if the same person be insolvent, it is not so brought. Is the difference to be that the direction is in one case to apply the proceeds in payment of a debt to the agent, and in another case to pay over the proceeds to the party, that he may make the same application personally?

What is the object of the rule? Discovery. Discovery from whom? Clearly the person who has knowledge of the facts, without whom the cause of action in most cases would not exist, within whose breast alone is most generally concealed the truth which is sought to be ascertained by the litigation.

Take the present cases. The contracts were made with McLean. If they were obtained by fraud or concealment on his part, if vitiated by his misconduct or breach of duty, if at his suit, it would be unconscionable to allow a recovery. Should the defendant be prevented from having discovery at this stage because others are seeking to enforce their claims?

The tendency of all modern legislation is to enable the facts to be ascertained at the earliest moment possible. Is this to be defeated by technical objections not founded on merit?

It will be remembered that the profession found the inconvenience attending the want of power in the Court to order the examination of past officers of corporations who might or might not still remain members, but not officers, and be succeeded by others who had no knowledge of the facts. Some will remember, upon the attention of the Attorney-General being called to the defect, how speedily he removed it by amending the law. In such a spirit must the law be administered, and the order of the Master is, I think, made in accordance with such spirit. If it shall turn out that this is not so, I imagine



the rule will at once be amended to cover such a case as this. Had I felt certain that the Master was in error, it would have been my duty, however much against my inclination, to have yielded to Mr. Shepley's well-pressed appeal.

I am not clear he is wrong. On the contrary, I think he was right. I cannot interfere, and the appeal must be dismissed. Costs in the cause to the defendants.

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### KINNEAR V. BLUE.

*Married woman—Judgment—Rule 80, O. J. A.*

Judgment may be obtained against a married woman under Rule 80, O. J. A., but execution thereunder must issue against her separate estate only.

[December 5, 1884.—*Rose, J.*]

THIS was a motion for judgment against a married woman, under Rule 80, O. J. A.

*F. E. Hodgins*, for the plaintiff.

*J. B. O'Brian*, for the defendant.

The facts appear in the judgment.

The following cases were cited :

*Berry v. Zeiss*, 32 C. P. 231 ; *Ortner v. Fitzgibbon*, 50 L. J. Chy. 17 ; *Darrant v. Ricketts*, 8 Q. B. D. 177 ; *Moore v. Mulligan*, W. Notes, 1884, p. 34.

ROSE, J.—The affidavits for the plaintiff shew that defendant was a widow prior to her marriage to her present husband : that while so a widow she carried on the business of a hotel-keeper in her own name, owning the business ; that since her marriage she has continued the same business in her own name, still owning it : that while a widow she opened an account in her own name with the plaintiff, which

was so continued to the date of closing the account sued upon, as shewn in the affidavit; that credit was always and at all times given to her, and never to her husband, who is alleged to be financially irresponsible.

This evidence is uncontradicted. The defendant appears by counsel, and urges that under the law as at present existing judgment cannot be obtained against a married woman under Rule 80.

I think the contention fails. Prior to 47 Vic. ch. 19, O., the Courts in some instances granted general judgments against married women, leaving the plaintiff to recover out of separate estate if he could find it. *Burns v. Robb*, (unreported) in the Common Pleas Division, some two or three years ago, was one case which comes to my mind. There the defendant did not plead coverture, a general verdict was given for the plaintiff, and a general judgment entered.

By 47 Vic. ch. 19, O., the law is made more clear, and where, as here, there is uncontradicted evidence of separate trading, separate credit, separate estate, and admitted or uncontroverted liability past due, I do not see why judgment should not at once be granted.

The case of *Perks v. Mylrea*, W. N. for 1884, p. 64, is a clear authority under the Married Woman's Act of 1882, similar to our Act of 1884, 47 Vic. ch. 19.

As under sub-sec. 2 of sec. 2 of 47 Vic. ch. 19, "any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise," and as prior to such Act such property alone was liable, I make the order in the terms of the order by Field, J. in *Perks v. Mylrea*, namely, that judgment may go, but that execution shall issue only against her separate estate. Costs of this application to be added to the general costs of the cause.

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## MERCHANTS BANK V. MONTEITH.

*Estoppel—Administrator bound by fraud of intestate—Executor de son tort.*

The letters of administration to an infant as administrator, were revoked after judgment against him in an action brought by him to recover certain assets of the estate, and new letters were granted to one P., who thereupon obtained an order of revivor in such action, directing the further proceedings to be carried on by P. as administrator and plaintiff. Before P. could move against the judgment the order of revivor was rescinded. P. in this administration action attacked the validity of the securities which the former administrator had impeached in the action referred to, whereupon the plaintiffs (who had been defendants in that action) applied to have it ruled that the judgment in such other action was *res judicata* against P. in this administration proceeding.

*Held*, that by the discharge of the order of revivor in the action, in which the plaintiff by revivor was suing in *autre droit*, such action was left without a plaintiff, and the judgment recovered was not under the circumstances an estoppel against P.

Where certain creditors and the administrator were parties to an order in Chambers compromising an action respecting certain assets of the estate, *Held*, that they were bound by such compromise, and could not impeach in this administration proceeding the validity of securities which had been in question in the action compromised.

An executor or administrator is estopped by the fraud or criminal acts of the deceased person he represents from seeking to invalidate securities tainted by such fraud or criminal acts, which such deceased person had given to his creditors during his lifetime.

The party who sells or gives the goods of a deceased person to another, but not the purchaser or receiver, is subject to the liability of an executor *de son tort*.

The rule that where an executor takes the testator's goods on a claim of property in them himself, although it afterwards appear he had no right, such claim being expressive of a different purpose from that of administration as executor, is also applicable to the case of a person taking the goods of a deceased person under a fair claim of title, such person, though he may not be able to establish his claim of title completely in every respect, is not liable to be charged as an executor *de son tort*.\*

[January 22, 1885.—*The Master-in-Ordinary*.]

In an administration suit certain unsecured creditors of the testator sought to attack certain warehouse receipts given by the testator to the plaintiffs and others, on the ground that they were invalid and therefore void against such unsecured creditors. The Master ruled that he had no jurisdiction to try any such an issue, but on appeal, Boyd, C., held that he had, *ante* p. 458. The reference then proceeded under the state of facts set out in the present judgment.

\*See judgment of Boyd, C., post p. 475.

*Rae and Miller*, for the plaintiffs.

*W. Barwick*, for Walsh.

*J. A. Paterson*, for the unsecured creditors.

*J. Macgregor*, for the administrator.

MR. HODGINS, Q. C.—MASTER - IN - ORDINARY. — The order on appeal from my judgment in this case declares that any creditor or set of creditors, or the administrator, is at liberty to attack or resist any claim sought to be proved against the estate in any way whatever; and directs that “the said Master is to try and determine any issue or issues that may be raised thereon.”

I had ruled that neither under the Chamber order for administration, nor under Chy. G. O. 220, had I jurisdiction to try the validity of the statutory securities called warehouse receipts impeached in this case, nor whether such securities, given to the plaintiffs by the testator in his lifetime, were fraudulent and void against the general creditors of the testator.

But under the broad terms of the order on appeal, evidence has been received on all the issues raised by the unsecured creditors and the administrator against the claims of the Merchants Bank, the Dominion Bank, and James Walsh.

The litigation respecting these warehouse receipts has been going on for some time in each of the Divisions of the High Court. About the time the infant defendant, then claiming to be administrator, obtained the *ex parte* order for administration, he instituted suits impeaching these warehouse receipts against the three parties named. The proceedings in these suits have been proved before me, and they furnish some unique illustrations of legal procedure not to be found in our authorized books of practice.

*Monteith v. Merchants Bank*, was a suit in the Common Pleas Division by the infant as administrator, to compel the bank to account as executor *de son tort* for the proceeds of certain goods received and sold by the bank after the testator's death.

The bank claimed title to the goods under warehouse receipts given by one Herson to the testator in the usual form, and endorsed by the testator to the bank as collateral security for certain discounts.

The action was tried at the Toronto Winter Assizes, 1884, before Rose, J., without a jury, whose findings were as follows :

“I find as a fact that the goods claimed were covered by the warehouse receipts produced by the bank, and were taken by the bank under and by virtue of such receipts. I find that the bank advanced the moneys secured by the receipts. I find that Herson, who signed the receipts, was lessee of the cellar where the goods were stored and warehoused. I find that Monteith represented to the bank that Herson was a warehouseman, and had warehoused goods for him for years, and on such representation had obtained the advances. I hold that Herson cannot be allowed to give evidence that the warehouse receipts were false and fraudulent ; that the plaintiff is not in any better position than the deceased, and cannot claim the goods as against his representations on which the moneys were obtained ; and that the defendants are entitled to judgment, with costs. The action is one which is not in accordance with one's notion of the commonest principle of morality, and reflects discredit on all the parties concerned in prosecuting the claim.”

After the trial the letters of administration to the infant were revoked, and letters of administration *durante minore etate* were on the 9th May, 1884, granted to John James Pritchard, one of the defendants in this administration proceeding.

Pritchard, intending to move against this judgment thereupon obtained an order of revivor in that action, by which it was ordered that the proceedings should be continued by him as administrator and plaintiff in the room of Monteith removed.

Under some precedent with which I am unfamiliar, the receiver (appointed in this matter under an order dated 29th April, 1884,) with the assistance of the bank, applied for, and after argument obtained an order in Chambers



rescinding the order of revivor—thus enriching our list of precedents with the novelty of an action pending in one of the Courts without the *actor*, or plaintiff; the order with grim justice declaring that “all further proceedings in this action are stayed.”

After proving the proceedings in that action, counsel for the plaintiffs asked me to rule that under the judgment of Rose, J., the question as to the validity of the warehouse receipts was *res judicata*; but, as no analogous precedent was cited, I had to rule that an action without a plaintiff could not operate as an estoppel against the administrator who had been so unceremoniously hustled out of the suit he was prosecuting for the estate he represented.

*Monteith v. Dominion Bank*, was brought in the Chancery Division to compel the bank to account as executor *de son tort* for goods of the testator received and sold by it after the testator's death, under similar warehouse receipts.

The action was not tried; but on the 15th March, 1884, an order was made in Chambers upon the application of the defendants as follows: “It is ordered that John J Pritchard, of the city of Toronto, in the county of York, clerk, be and he is hereby appointed the next friend of the above named plaintiff, Frederick William Monteith, in this action; and that this action be, and the same is hereby dismissed out of this Court; both parties paying their own costs of suit.”

Thus an official of one of the Courts suing in a representative capacity in right of the testator, or in *autre droit*, and not for a personal right was given the intrusive companionship of a *prochien ami*, or next friend, and of one nominated by his antagonist.

*Monteith v. Walsh* was a similar action in the Queen's Bench Division against the claimant Walsh, to compel him to account as executor *de son tort* for certain other goods of the testator replevied by him after the testator's death under similar warehouse receipts.

In this action a similar order of revivor was obtained by Pritchard, as in *Monteith v. Merchants Bank*. The

precedent of discharging the plaintiff out of his suit was not followed ; but the receiver (who obtained the opinion of three counsel against the possible success of the suit) joined with the present plaintiffs in obtaining an order in Chambers in this administration matter, and in the presence of the solicitors for the unsecured creditors and for Pritchard and Walsh, authorizing a compromise whereby the action of *Monteith v. Walsh* was dismissed without costs.

The unsecured creditors and the defendant Pritchard were parties to that order of compromise, and must be held bound by it ; and, without commenting upon the propriety of the receiver's application, I must hold that before this tribunal, at any rate, the judgment of the Master in Chambers in authorizing the compromise is final.

The further oral evidence proves that after Monteith's death, and before any of the bank officers appeared, Herson, who had given these warehouse receipts, went with his solicitor, Mr. Macgregor, to the place where the goods were stored, and posted up the following notice, which had been drawn up by his solicitor : " From this pile west and north is the property of the Dominion Bank and Merchants Bank, of which I am warehouseman, and have given warehouse receipts. J. Herson."

The bank officers, when they arrived at the warehouse found this notice up, and Herson pointed out to them the goods covered by their warehouse receipts. Shortly afterwards, the sheriff's officers arrived with the writ of replevin in Walsh's case, and Herson, who swore that he tried to keep possession of the goods for the banks, then told the bank officers that they might take the goods themselves, which some time afterwards they did.

Herson was examined as to the giving of the warehouse receipts, and, if his evidence is to be credited, he and Monteith were each guilty of a misdemeanor, the former in giving, and the latter in obtaining money on, false warehouse receipts. His evidence, therefore, is that of an accomplice in a criminal act, and although I held that he was not estopped from giving evidence that these ware-

house receipts were false and fraudulent, my experience in criminal prosecutions induces me to recognize the advice usually given to juries by Judges of Assize, viz: to regard with distrust the admissions of an accomplice, and not to give effect to them unless materially confirmed by other evidence. That judicial advice and salutary rule of experience is especially applicable to a civil case where the party, whose title under these' statutory securities is attacked, was in no way, direct or indirect, a party to the criminal act of the criminal parties. Herson claimed no protection before giving his evidence; his evidence is unsupported, and is negatived by his various warehouse receipts, and by his declarations and acts in the presence of the bank officers after the testator's death, and is also negatived by the written and parol declarations of Monteith in his lifetime.

The Evidence Act R. S. O. ch. 62, sec. 10, provides that in a suit against the assigns of a deceased person, an opposite party shall not obtain a decision in respect of any matter occurring before the death of the deceased person unless his evidence is corroborated by some other material evidence.

The spirit of the Act applies to this case; and therefore, on both grounds, I must decline to give effect to Herson's evidence.

Even if the warehouse receipts were invalid, I could not, on the evidence, find that the banks had made themselves executors *de son tort*. Applying the cases to what occurred immediately after the death of Monteith, it would be more reasonable to hold that Herson had placed himself under that liability. He and his solicitor went to the warehouse before the bank officials, and when the latter arrived Herson pointed out, by parol and in writing, that he had possession of the goods as warehouseman, and subsequently told the banks to take them.

"If a man give or sell the goods of an intestate to A., this does not make A. an executor *de son tort*; or if he claim a property in the goods, as a gift of the intestate:" *Comyn's Dig. Adm. C. 2*. This rule was applied in *Paull*

v. *Simpson*, 9 Q. B. 365. A lessee died intestate during the term of a lease. His widow, without taking out administration, entered, and paid rent to the landlord; and then, with her concurrence, her son-in-law A., took the premises, and continued to the end of the term. It was held that although she might be, A. was not, executor *de son tort*. Wightman, J., said: "The passages from *Comyn's Digest* are express authorities on this point. If this were not so, there would be no end to the number of persons who might be charged." Patteson, J., added: "If one takes goods of the deceased and hands them to another, this shall charge only the giver as executor *de son tort*."

So, where a person sets up a colourable title to the possession of the goods of a testator, though he may not be able to establish a completely strict and legal title, such title is sufficient to exempt him from being charged as an executor *de son tort*: *Femings v. Jarratt*, 1 Esp. 335. In that case, Lord Kenyon, C. J., observed: "If the defendant came to the possession by colour of a legal title, though he had not made out such title completely in every respect, he should not be deemed an executor *de son tort*."

The reason for the rule is thus stated in respect of executors: "If an executor takes the testator's goods on a claim of property in them himself, although it afterwards appear that he had no right, since such claim is expressive of a different purpose from that of administration as executor, he is not liable:" *Toller on Executors*, 43.

The cases in the United States Courts are to the same effect.

In *King v. Lyman*, 1 Root (S. C.) 104, where goods had been taken under a bill of sale, evidence was tendered to shew that the bill of sale was fraudulent. But the evidence was rejected, and it was held that the holding and disposing of goods and chattels conveyed by a deceased in his lifetime would not make the party taking an executor *de son tort*. Although the bill of sale may be fraudulent as to creditors, it is good and valid between the parties.

*Debesse v. Napier*, 1 McCord (S. C.) 106, was a case where



deceased had goods in the hands of a factor for sale. The factor had a lien on them for his commission and charges. Deceased drew an order on the factor for the whole proceeds of the goods after satisfying his charges, which order the factor accepted. After the deceased's death the factor sold, and applied the proceeds as directed, and it was held that he had the right to do so.

If a person sets up in himself a colourable title to the goods of a deceased, as when he claims a lien on them, though he may not be able to make out his title completely, he will not be deemed an executor *de son tort*: *Densler v. Edwards*, 5 Ala. 31.

So where a deceased had mortgaged certain chattels, but the chattels remained in the mortgagor's possession up to the time of his death, and the defendant then took and sold them, it was held that the taking of the chattels into his possession under a fair claim of right did not charge upon such defendant any liability as an executor *de son tort*: *Smith v. Porter*, 35 Me. 287. See also *Claussen Lafrenz*, 4 Greene 224.

The cases referred to, and many others, also shew that the administrator, Pritchard, is shut out by the fraud or criminal act of the testator under whom he claims from impeaching the validity of these warehouse receipts.

On the evidence before me, I find that, after the death of the testator, Herson was in possession of these goods that he claimed to be in possession of them as warehouseman; that he told the bank officers that they might take the goods; that thereupon, and by virtue of their warehouse receipts, the banks took and disposed of the goods; that they had a fair colour of right to take the goods, and in no way took them as characteristic of the office of executor, or so as to be chargeable with the liability of executors *de son tort*.

I am still inclined to think that when the question of jurisdiction is further considered, it will be found that the new action of account which R. S. O. ch. 107, sec. 30, gives to a creditor against another who has obtained more than his *pari passu* share of the assets by virtue of assignments



made by a testator in his lifetime, and which assignments are valid in law and equity against the personal representative, cannot be prosecuted in the Master's office under a Chamber order for administration and on oral pleadings. If so, then every conveyance of property made by a debtor to a creditor, and not impeached in the lifetime of such debtor, may be attacked and declared invalid under similar Chamber orders for the administration of such debtor's estate.

The claims made by the unsecured creditors and the administrator under the order on appeal are, therefore, dismissed, with costs.\*

\* The following is the judgment of BOYD, C., on appeal.

BOYD, C.—I feel compelled to allow this appeal, to the extent of remitting the matter to the Master for further consideration and evidence, if the parties desire to give it. I am inclined to think that the reasons he assigns for holding that the warehouse receipts are valid; shew an error in principle in the application of the laws of evidence. It may be that this conclusion upon the facts is well founded, and would not have been disturbed had no reasons been given; but having regard to the mode by which he reached his conclusion, I am not satisfied that he has not attached over much importance to the manner of viewing evidence which obtains in criminal trials. This is not such a trial, and it is unsafe to import into civil causes, rules which are observed chiefly in favour of life and liberty. A jury will be cautioned against the danger of convicting upon the uncorroborated evidence of an accomplice; but that is not precisely the way in which the evidence of a person derogating from his own act will be viewed in civil litigation. Perhaps the highest measure of judicial opprobrium bestowed upon the evidence of a witness impeaching his own act, is that attributed to Lord Mansfield, who held that, instead of such a one finding credit, he deserved the pillory; but Lord Eldon more cautiously said, that such evidence was to be received with the most scrupulous jealousy: *Bootle v. Blundell*, 19 Ves. 504.

The evidence of Herson should not be set aside upon any theory as to the effect of such testimony in criminal causes, but should be dealt with upon its merits or demerits, and the modes ordinarily employed to test credibility in litigation between man and man. The Master also lays some stress on the R. S. O. cap. 62, sec. 10, as affecting the evidence of Herson. But this enactment should not be allowed to interfere with the adjudication of the case upon the facts, Herson is not claiming anything as against the estate or the assigns of the deceased testator; and, so far as that statute is concerned, it has really no application to the matters in issue as between the bank and the other creditors.

Herson's evidence being admissible, as it is unquestionably, it only remains to consider if it is, and in how far it is credible; and, if credible, to what extent it supports the contention of the parties who rely upon it. Due consideration is, of course, to be given to the inconsistencies the Master has referred to which detract from the value of Herson's testimony, and to the conflict which appears between this conduct and previous statements as compared with his present evidence. But the Master has gone beyond these, and kindred tests of truth and trustworthiness, and

## NEIL V. PARK.

*Partnership—Specially pleading a statute—R. S. O. ch. 133—Rule 141,  
O. J. A.*

The statement of claim alleged a partnership between the plaintiff and defendant, but did not aver whether the agreement was in writing or or not. The defence set up a special agreement by which the defendant was to be remunerated by a share of the profits in lieu of wages or salary, but did not expressly refer to the R. S. O. ch. 133. It was admitted that something was due to defendant, and a reference was ordered.

The Master-in-Ordinary held, following the remarks of Proudfoot, J., in *Rogers v. Ullman*, 21 Gr. 139, that as the defendant had not pleaded R. S. O. ch. 133, so as to negative the plaintiff's allegation of a partnership, he could not claim the benefit of that statute to support his account, but to enable him to properly raise the question on appeal, permitted an affidavit to be filed shewing that there was an agreement under the statute.

Held, on appeal, that the case did not come within the terms of Rule 141, O. J. A., and that it was not necessary, more specifically to plead the statute.

[February 11, 1884.—*The Master-in-Ordinary.*]

[February 20, 1884.—*Boyd, C.*]

THIS was an action for an account arising out of alleged partnership transactions between the plaintiff and defendant.

The material parts of the statement of claim were as follows:—

“3. In or about the month of February last the plaintiff and defendant entered into a co-partnership for the purpose of manufacturing, &c.

has allowed his decision to be influenced by the introduction of other inapplicable elements.

It appears to me to be of considerable moment to have a satisfactory determination of the questions of fact, arising upon the validity of the warehouse receipts, and that without such a determination, it is premature to deal with the questions of law discussed hypothetically by the Master, and, to some extent argued before me. It is not to be inferred that I have formed any opinion for or against the other questions involved, apart from that which I now decide. I reluctantly return the subject matter of this appeal to the Master, with costs in any event to the appellants at the close of the controversy. It is for him to decide upon the whole matter, viewing the evidence and dealings with it as I have indicated.

"4. The terms of the said partnership were as follows:—  
(Then follow the terms, &c.)

"The plaintiff claims: 1. That the said partnership may be dissolved. 2. That the defendant should be ordered to give an account of all moneys received and expended by him under the said partnership."

The material parts of the statement of defence were as follows:—

"2. An agreement was entered into between the plaintiff and the defendant by which a share in the net profits or proceeds of a portion of the trade or business carried on by the defendant, to wit: One-third of the said net profits was to be allotted and paid to the plaintiff in lieu of salary or remuneration; the said plaintiff to be entitled to draw in the meantime the sum of \$9 per week."

"4. On or about the 11th day of September the plaintiff absented himself from the said business for several days without the permission of the defendant or other reasonable excuse, and thereafter; and on or about the 14th day of September the plaintiff voluntarily gave up work. At that time the defendant had not received from the said corporations payment for the said hydrants and valves, nor has he yet been paid the full amount due him therefor. The defendant was willing to pay whatever might appear to be coming to the plaintiff when the results of said works were ascertained and amounts received."

The plaintiff then joined issue.

It was admitted at the trial that something was due by the defendant to the plaintiff, and a reference was accordingly directed to the Master.

On the reference before the Master, *Watson*, for the plaintiff, objected to the accounts which were filed by the defendant on the basis of the agreement set up in the statement of defence, as not sufficiently disclosing the alleged dealings by the plaintiff under the partnership.

MR. HODGINS, Q. C., MASTER-IN-ORDINARY.—I do not think I am at liberty to express an independent opinion on the question raised as to the sufficiency of the accounts brought in by the defendant. Proudfoot, J., in referring to the statute on which the defendant relies for the sufficiency of his account, said, in *Rogers v. Ullman*, 27 Gr. 139: "It was contended that the plaintiff had no right to an account, that the agreement was affected by the R. S. O. ch. 133, sec. 3, by which it is provided that an employer giving to one in his employment a share in the profits in lieu of remuneration, the employed shall have no right to investigate the accounts or interfere in the management of the business, and the account stated by the employer shall not be impeached upon any ground whatever.

"The statute has not been pleaded, and it is perhaps open to the objection that unless pleaded it cannot be relied upon as a defence."

This latter observation, though *obiter dictum*, is binding on me; and besides it has been stated that the Chancellor at the trial in *Buson v. Allen* (not reported), expressed a similar opinion. See also *Story's Equity Pleading*, sec. 769.

In deference to the opinions above expressed, I must rule that as the defendant has not pleaded the statute so as to negative the plaintiff's allegation of a partnership, he cannot claim the benefit of it to support the account brought in. But to enable him properly to raise the question on appeal, he may file a further affidavit with his account shewing that there was an agreement between him and the plaintiff as defined and authorized by the statute.

From this decision the defendant appealed.

The appeal was argued by the same counsel.

BOYD, C.—The requirements of proper pleading under the Judicature Act have not been observed with much solicitude on either side. The effect of the English order xix. Rules 4, 24, 27 (corresponding with our Rules 128, 135, and 138), is that where an agreement is relied upon,



whether under the Statute of Frauds or not, it is for the person relying upon it to state whether the agreement is in writing, or by parol, or partly in writing and partly by parol, or to be collected from a variety of documents or letters: *Turquand v. Fearon*, 40 L. T. N. S. 543. So the effect of Order xix. Rule 23 (corresponding to our Rule 141), requires that where a party intends to rely on the illegality or insufficiency in law of a contract, whether with reference to the Statute of Frauds or otherwise, he must specially plead that illegality or insufficiency, and it is not sufficient to traverse allegations of the opposite party made in anticipation of objections to the contract on such grounds. In such a case not only must the special facts be pleaded, but it must also be stated that the party intends to claim the benefit of the Statute of Frauds, or other statute which affects the legality or the validity of the contract in question: *Clarke v. Callow*, 46 L. J. Q. B. 53; *Pullen v. Snelus*, 40 L. T. N. S. 363. In the former case (*Clarke v. Callow*) Mellish, L. J., says, at p. 54: that the intention of this rule is to introduce into all pleadings the practice of the Court of Chancery. He refers thus to the former system of pleading: "At law, if the contract was denied, it was a matter of evidence whether the contract were one which could be sued upon, or whether the remedy was barred by the statute. But in equity, if the defendant intended to rely upon the Statute of Frauds or any other special statute, he was compelled to make a specific averment of his intention."

With this agrees the judgment of Fry, J., in *Futcher v. Futcher*, 29 W. R. 884. Though it is to be observed that his views as to the effect of other Rules of Order xix. are at variance with *Turquand v. Fearon*, which was not cited to him. But this view of pleading in equity is opposed to what is laid down in *Wilde v. Wilde*, 20 Gr. at p. 532, where Strong, V. C., decides that the Statute of Frauds as a defence is open to the defendant, though it was not pleaded, upon the principle that the plaintiff being put to prove that which he alleges (as to the contract or trust), is bound



to prove it by evidence sufficient according to the requirements of the statute.

It is better to conform to the English authorities as to the technical manner of pleading the statute in cases falling under Rule 141, whatever may have been the latitude in our system before the Judicature Act. But this holding does not dispose of the question raised by this appeal. The statement of claim alleges a partnership between plaintiff and defendant, not averring whether it is in writing or not. The defence sets up with like vagueness a special agreement by which the defendant was to be remunerated by a share of the profits in lieu of wages or salary. The silence of the pleading would not admit a partnership by the effect of our Rule 148; that the plaintiff would still require to prove upon the pleadings as framed; and in addition the defendant would be allowed to prove affirmatively the special agreement set up by him. The parties are not agreed as to there being a contract of a particular kind. It is not the case of one defined agreement which if not evidenced in a particular way is invalid, but the difference between the parties is that the plaintiff relies upon a partnership, and the defendant, while in effect denying this, relies upon a special bargain which is not a partnership, but something very different by virtue of the statute applicable thereto, *i. e.*, R. S.O. ch. 133, sec. 3.

The case does not therefore fall within the scope of Rule 141, and I am not disposed to clog the new system of pleading with unnecessary technicalities as an outgrowth of judicial decision. In the present case I deem the pleading sufficient which sets forth enough to shew that the defendant is relying upon a contract under ch. 133, though he does not in terms refer to the statute. That specific reference is a mere matter of form—the other is the matter of substance. The plaintiff cannot have been misled by this mode of pleading, nor should the defendant lose any rights he may have because he has not embodied in his pleading some formula to which a magic effect is to be attributed. This manner of claiming the benefit of a

statute in pleading is referred to by Moss, C. J., in *Gilleland v. Wadsworth*, 1 A. R. at p. 93, who doubts whether in any case it rests on any solid foundation. The whole scope of his judgment adopted as that of the full Court of Appeal in *Kiely v. Kiely*, 3 A. R. 438 is opposed to the conclusion that it is necessary to plead parts of a public statute in order to get the benefit of it either upon demurrer or at the hearing.

I think that the Master should not have held the defendant precluded by his pleading from bringing in his account under the Master and Servants Act, that being a convenient way of ascertaining whether such was or was not the real relationship between the parties to this litigation.

The pleadings in this case admitted the right of the plaintiff to have something from the defendant as the proceeds of the dealings they were engaged in, and therefore it was referred to the Master to ascertain how much. But it does not follow that the defendant is to be obliged to bring in an account on a partnership footing, when that has not been established by the plaintiff, nor does it follow that the defendant can hold the plaintiff to what he offers under the Master and Servants Act if he fails to establish that such was the bargain between them. It was never intended that the whole enquiry before the Master should go off upon a question of pleading, nor do I think the defendant's pleading precludes him from the contention he makes as to his limited liability under the Master and Servants Act.

The Master acted to some extent upon the language to be found in *Rogers v. Ullman*, 27 Gr. 137, which hardly amounts to a dictum, that this particular statute should be pleaded. But it was not necessary to deal with that question in that case, so that it does not bind me.

The appeal is allowed, but the costs will be reserved to be disposed of on further directions.

## SMITH V. GREEY ET AL.

*Patent case—Particulars—Examination.*

The general law applicable to discovery governs in patent cases. A defendant may be properly interrogated as to the grounds of his attacking a plaintiff's patent, and there should be a fair and full disclosure of the particular lines of attack which are contemplated, but no such individualizing of the persons who are alleged to be prior users as would enable the plaintiff to fix upon the defendants witnesses.

[November 10, 1884.—*Boyd, C.*]

A motion by the plaintiff to commit the defendants for unsatisfactory answers on their examination for discovery before the trial.

The facts appear in the judgment.

*Howland*, for the motion.

*H. D. Gamble*, contra.

BOYD, C.—In patent cases parties may apply for particulars, and may also examine in the usual way for discovery. When particulars are furnished and a length of time is given for that purpose, the party who delivers them will be precluded at the trial from going outside of them in his evidence; but such is not the rule where he is examined and has acquired knowledge of objections subsequent to his examination. A defendant may be properly interrogated as to the grounds of his attacking the validity of the plaintiff's patent, and the question before me is as to the particularity with which such a line of investigation may be pressed by the party examining.

*Birch v. Mather*, 22 Ch. D. 629, decides that the plaintiff is entitled to obtain information as to the names and addresses of the persons who have used the invention before the patent, if novelty is one of the matters in issue.

In *Crossley v. Tomey*, 2 Ch. D. 533, it was held that the defendant must give the names of some of the persons who are alleged by him to have used the invention prior to the date of the patent. Malins, V. C., there assigns

as the reason for this that the plaintiff may, as early as possible, know what defence he has to meet, and may be able to find out whether in fact his alleged invention was known before he took out his patent, and may inquire of A. and B. and C., who are named as having used the alleged invention, and ascertain whether the defence is made out or not, and this would have the effect of abridging litigation."

This is precisely the opposite of what was laid down by the Judges in *Benbow v. Low* 16 Ch. D. 93, viz: that interrogatories will not be allowed which evince a desire to know what evidence will be given by the plaintiffs in support of their statements, and of the acts which they allege make out their case. Cotton, L. J., is thus reported: "It may be very convenient for the defence to have such discovery, and it may enable the defendant well to prepare for trial with less apprehension and with less expense, but the question which we have to consider is, whether they are entitled, as a matter of right, to discovery from the opposing party, and however much trouble it would save them and expense, in my opinion they are not, because they come within the principle that you are not entitled to see what evidence your opponent is prepared to give in support of his own case." That is as I have always understood the correct principle regulating discovery, unless there is some exception in patent cases. These cases were not considered to form any such exception in *Daw v. Eley*, 2 H. & M. 725, and in *Bovill v. Smith*, L. R. 2 Eq. 459. Malins, V. C., refers to this last case in *Crossley v. Tomey*, at p. 539, and says that there the Act of 15 & 16 Vict. Cap. 89, was not particularly referred to, and his decision as to minute investigation and discovery evidently proceeds upon this, that such is the effect intended by that Act. That is also the explanation of Mr. Justice Chitty's decision in *Birch v. Mather*, *supra*, as he points out that the 41st sec. of the Act of 1852 provides that the places at which and the manner in which the invention alleged to be used or published prior to the date of the letters patent has been

used are to be stated in the particulars, and upon that he says it is argued that there is the right on the part of the plaintiff applying for particulars to have only the places, and not the names and addresses.

There is no legislation in this Province similar to that of the English Patent Acts in these particulars, nor has it been adopted except in proceedings by *sci fa.* to repeal patents: *Regina v. Hall*, 27 U. C. R. 146; and therefore the general law applicable to discovery governs here.

It is to be inferred from a perusal of the examination in this case that the defendants have no personal knowledge as facts of the alleged first inventor or the alleged prior user. Their statements therefore would not be any evidence to prove or to facilitate the proof of what is in issue. Proper evidence would still have to be given of what is relied on by the defence in order to invalidate the patent. There should be a fair and full disclosure of the particular lines of attack which are contemplated, but no such individualizing of the persons who are alleged to be prior users as would enable the plaintiff to fix upon the defendants, witnesses. All the questions which the defendants have left unanswered tend in this direction, and I do not think, according to the present state of our practice, that the plaintiff is entitled to enforce answers: *Mills v. Scott*, 5 U. C. R. 360. I refuse to make any order, and the costs of this application are costs in the cause to the defendants in any event.

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## RE JOSEPH HALL MANUFACTURING COMPANY.

*Winding-up order—45 Vic. ch. 23 (D), carriage in Master's Office—Jurisdiction of Master in Chambers.*

It is preferable to have the proceedings under an order for winding-up a company under 45 Vic. ch. 23 (D), conducted by solicitors who are totally unconnected with the company to be wound up.

It is not competent for the Master in Chambers to make an order under section 77 of the Act as amended by 47 Vic. ch. 39, sec. 5 (D), referring the winding-up to the Master in Ordinary. That may be done by a Judge, as in conformity with the usual course of proceedings in other causes and matters, but it is not the practice, save in one or two exceptional cases, to have references ordered by the Master in Chambers to the Master in Ordinary. The intention of the Act is that the Master in Chambers, or Local Master, or Master in Ordinary may grant a winding-up order, and conduct all the proceedings necessary therefor in his own office and before himself as a judicial officer.

Under the facts stated below, an order having been obtained in Chambers by one creditor for winding up a company the conduct of the proceedings was given to three creditors who had also applied for such order.

[November 19, 1884.—*Boyd, C.*]

*William Roaf*, for certain creditors of the Joseph Hall Manufacturing Company, moved for an order for the winding-up of the company under 45 Vic, ch. 23 (D.), and to set aside an order obtained by Peter Ryan for the same purpose from the Master-in-Chambers, or for an order giving the applicants the carriage of the proceedings under Ryan's order in the Master's Office.

*Moss, Q.C.*, for Peter Ryan, contra.

The facts appear in the judgment.

BOYD, C.—No rules having been framed under 45 Vic, ch. 23 sec. 98, (D.), the procedure in winding-up petitions is to be as nearly as may be assimilated to that of the Court in other cases. See also sec. 88. That being so, the question for decision is here, whether the order made by the Master-in-Chambers at the instance of the creditor Ryan is to prevail against the application of the three other creditors who now apply for an order, or for the carriage of the proceedings under Ryan's order. The matter is to be treated as if both petitions had been presented to the

Court on the 4th of November, that being the day on which both were returnable. Ryan by going to Chambers obtained an order, which was used as a means of preventing the other creditors getting an order when their motion came on in due course on that day. No advantage should be gained by Ryan because he anticipated the usual course of proceedings with a view, no doubt, to get ahead of the other applicants. Had both proceedings then come on together who would have had priority? The creditor Ryan relies upon this, that his petition was served the day before that of the other creditors. To this it is answered no affidavit was then filed, and no affidavit verifying the petition was filed till after the order was made. It appears that the affidavit on which the order was made had a blank at the place where the amount of the debt should have been inserted. Had no cause been shewn to either petition the order must have been pronounced on the application of the other creditors, whose materials were regular and in proper shape, and no order could have been made on Ryan's application because his affidavit was defective. Again there is a certain suspicion attaching to the fact (which is not denied) that pending Ryan's petition his present solicitor was acting as solicitor for the company in actions brought against the company by plaintiff, whose solicitor was the present solicitor for the company. It is preferable to have the winding up conducted by solicitors who are totally disconnected with the company to be wound up.

There is another point which was not argued, but which should turn the scale against the Ryan order, and that is, that it would be found unworkable in its present shape. I think that it was not competent for the Master-in-Chambers, to make an order under section 77 of the Act as amended by 47 Vic. ch. 39, sec. 5 (D.), referring the winding up to the Master-in-Ordinary. That may be done by a Judge as in conformity with the usual course of proceedings in other causes and matters, but it is not the practice (save in one or two exceptional cases) to have references ordered by the

Master-in-Chambers to the Master-in-Ordinary. If it is permissible for the Master-in-Chambers to do so, then any local Master or Referee could also do the same under 47 Vic. ch. 39, sec. 5, (D.) The intention of the Act is, that the Master-in-Chambers or local Master or Master-in-Ordinary may grant a winding-up order, and conduct all the proceedings necessary therefor in his own office and before himself as a judicial officer. If the petition is brought before a Judge he may according to the usual course of the Court delegate the prosecution of the proceedings to the Master or other officer, as may seem best. The Master-in-Ordinary has already ruled (a) that he has no jurisdiction to deal with matters under the Act referred to him by the Master-in-Chambers, and as at present advised I agree with his holding. I refer to *Brown v. Dollard*, 6 P. R. 113; *Queen v. Smith*, 7 P. R. 429; and upon the question of the conduct of the proceedings to *Harris v. Gandy*, 1 DeG. F. & J. 13; *Harvey v. Coxwell*, 32 L. T. N. S. 52; *Re Emma Smith's Estate*, 33 L. T. N. S. 804, and *Re McRae*, 25 Ch. D. 16.

The usual order will be made on the petition of the three creditors, what is done under Ryan's order confirmed, and conduct of the proceedings given to the three creditors. The costs of the application should be borne by the estate, as costs properly incurred.

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(a) See *Re Queen's City Refining Co.*, ante p. 415.

## LAVERY V. WOLFE.

*Examination—Production..*

The proper mode in examinations for discovery, where a witness neglects or refuses to produce, is for the examiner to direct what documents shall be produced and have the examination adjourned for that purpose. The practice of enabling a party by means of a subpoena *duces tecum* to get production on a two day notice of any documents he chooses to particularize is not to be encouraged, and a motion to commit for non-production was refused.

It is desirable to postpone examinations for discovery until after production.

[November 19, 1884.—*Boyd, C.*]

A MOTION to commit the plaintiff for not producing certain papers on his examination before the trial, under Chy G. O. 138, 140.

The facts appear in the judgment.

*O'Heir*, for the motion.

*Clement*, contra.

BOYD, C.—The plaintiff was examined in this case before a special examiner under the Chy. G. O. 138, 140, still in force. He was served with a subpoena *ad testificandum* with a special clause therein requiring him to produce certain letters, books, and documents at the time and place appointed for the examination. The plaintiff attended and was examined, but failed to produce any of the letters, books, or documents, alleging that he was willing to do so but had not seen the special provision in the subpoena which made it in effect a subpoena *duces tecum*. Upon this state of facts the application is made to commit. There is no power expressly given by the Chancery Orders to serve a party, who is to be examined for discovery, with a subpoena *duces tecum*, and to punish for a contempt if default is made in production. The inference is very strongly against such being the correct practice. G. O. 134 enabled either party, as of course after answer, to obtain production of all relevant documents within ten days after the service of the order. This practice has been adopted in Rules 222 and 513 of the Judicature Act. It is not desirable to make such a liberal extension of this privilege of discovery as would enable a party by means of a

subpœna *duces tecum* to get production of all documents he chose to particularize on a two days' notice at the office of the special examiner. Some of the English Judges have already characterized the power of compelling the other side to disclose all documents as of course as one of the most oppressive things in the practice. Per Matthew, J., in *Jacobs v. Great Western R. W. Co.*, Bitt. Rep. 78. By the R. S. O. Ch. cap. 50, sec. 158, an order for oral examination of either party may be obtained on affidavit. This order and an appointment of the examiner are served instead of a subpœna, and by sec. 161 a notice may be given to produce on the examination all books, &c., which the plaintiff would be bound to produce at the trial under a subpœna *duces tecum*. This practice varies from the mode of examination which was pursued in the present instance, under the General Orders of Chancery. By G. O. 147 a party who in being examined admits that he has papers, &c., is to produce them upon the order of the examiner before whom he is examined, and for that purpose a reasonable adjournment is to be allowed. If such an order is made then by G. O. 144, the person neglecting to do it may be punished as for a contempt. The practice provides for two methods of discovery: First, by production of documents; and, second, by examination of the party. As is pointed out in Mr. Holmsted's book, it is usual and advisable to postpone the examination till after production, 1 Rules and Orders, p. 64. The endeavour to combine these two methods of discovery by means of an examination and a subpœna *duces tecum* is not to be encouraged by treating non-production as a contempt. The proper course was to have had the examiner direct what should be produced, and to have stood over the examination for the purpose of procuring the documents, and if that practice had been observed there would have been no necessity for this motion. After the plaintiff has produced, he should attend for further examination, if the defendant desires it, and the costs of this application should be, in any event, to the plaintiff.



## RE THIN.

*Trustee for infants—Insurance moneys—Security—47 Vic. ch. 20. (O.)*

An order having been made under 47 Vic. ch. 20, sec. 12, (O.), for the appointment of a trustee to receive insurance moneys to which infants were entitled, the Master in Ordinary named a person as trustee; and required him to give security in double the amount to be received.

On an *ex parte* appeal the direction of the Master that security should be given was affirmed, and

*Held*, that it would be contrary to the uniform practice of the Court to appoint any one as the custodian of infants' money, whether as trustee or guardian, without requiring security for the proper discharge of his duties.

[December 2, 1884.—*The Master in Ordinary.*]

[December 15, 1884.—*Boyd, C.*]

Robert Thin, was insured by a policy in the Confederation Life Association. The policy was in favour of his wife and children, and he died intestate, and without appointing any trustee or guardian. The company were ready to pay the shares of the infant children, and they by their mother as next friend petitioned for the appointment of a trustee under sec. 12 of 47 Vic. ch. 20, (O.), and on 23rd September, last, Proudfoot, J., made an order referring it to the Master-in-Ordinary to appoint a proper person trustee to receive the infants' shares of the insurance money

*J. C. Hamilton* for the petitioners.

MR. HODGINS, Q. C., MASTER IN ORDINARY.—The Act 47 Vic. ch. 20, sec. 12, (O.), provides that if the insured has named no trustee of the insurance moneys, the shares of the infants therein may be paid to his executors, or to a guardian or trustee appointed by one of the Courts. And by sec. 14 a guardian appointed under sec. 12 is to give security for the faithful performance of his duty, and for the proper application of the moneys.

The insured named no one in whom he had a personal trust and confidence to act as executor or trustee; and now the Court is called upon to execute this new statutory power of appointing some person under one of two desig-

nated titles to act as the custodian of the moneys of these infants. The order directs me to appoint one under the title of trustee, but says nothing about security.

This is not the case of the Court appointing a new trustee in the place of one originally appointed by deed or will, in which case security would not be required.

If the statute had provided that the share of infants in these insurance moneys should be paid to "an officer appointed by one of the Courts," I apprehend the universal practice of Equity Courts—to require security from all persons appointed by them as receivers or custodians of the money of litigants—would apply.

Seeing that the statute has authorized the Court to appoint a custodian of these moneys under the title of "trustee" or "guardian," and has required the custodian appointed under the title of "guardian" to give security, I can see no magic in the name "trustee" which would relieve the custodian under that title from what the Act may be said to have indicated, though not expressed, and the practice of the Court to require.

I therefore rule that the proposed trustee must give security.

The Master thereupon certified that he approved of Mr Robert Wilkinson as a fit person to be trustee, upon his giving security in the sum of \$1800; being double the amount to be received.

The petitioners objected to the condition as to giving security, and appealed *ex parte*.

*J. C. Hamilton*, for the appellants, contended that the word trustee in the Act is used with the meaning given it by the practice of the Courts as a person of good position and responsibility, and who has not heretofore been required to give security: *O'Hara v. Cuthbert*, 1 Ch. Chamb. 304; *King of Hanover v. Bank of England*, L. R. 8 Eq. 350; *Re Tempest*, L. R. 1 Ch. 485; *Morgan & Chute's* Chancery Acts and Orders, ed. of 1876, pp. 101, 107, and 116. To

require a trustee to give security places him on the same level as a guardian, who is also referred to in the Act, and always had to give security. In this and other cases this provision of the Act will be defeated, as persons in good position selected by the family may be willing to act, yet refuse to ask others to become sureties for them. Security has never been asked when new trustees are appointed by the Court in place of those originally appointed by deed or will.

BOYD, C.—Mr. Justice Proudfoot, who made the order for appointing the trustee under 47 Vic. cap. 20, sec. 12, (O), agrees with me that it would be contrary to the uniform practice of the Court to appoint any one as the custodian of infants' money (no matter by what official name he is designated), without seeing that he either has given or do give security to the satisfaction of the Court for the proper discharge of his duties. I agree with the ruling of the Master, and affirm his report. All difficulty, I think, of procuring security will be avoided if the applicant is willing to have the Trust Company appointed as trustees to take charge of, and deal with the insurance moneys in question.

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## LIVINGSTON V. TROUT.

*Demurrer—Omission to enter—Motion for judgment—Rule 195 (a) O. J. A.*

A defendant did not, within ten days after delivery of a demurrer to a paragraph of the statement of defence enter it for argument and give notice, nor serve an order for leave to amend, as required by Rule 195 (a) O. J. A.

*Held*, on an *ex parte* motion by the plaintiff for judgment upon his demurrer, that the proper practice in such a case is to apply to a Judge in Court, upon notice to the opposite party, for an order to strike out the pleading or part of the pleading demurred to, and for a direction as to payment of costs; but on the return of the motion the party in default will have no right to be heard as to the validity of the pleading.

[December 2, 1884.—*Rose, J.*]

THIS was a motion *ex parte* for judgment.

The plaintiff demurred to a paragraph of the defendant's statement of defence. The defendant did not, within ten days after delivery, enter the demurrer or give notice thereof, nor did the defendant within such time serve an order for leave to amend.

*Clement*, for the motion.

ROSE, J.—Under the provisions of sub-sec. (a) of Rule 195, O. J. A., by reason of such default the demurrer is to "be held sufficient for the same purposes, and with the same result as to costs, as if it had been allowed on argument.

Under Rule 197, "where a demurrer to the whole or part of any pleading is allowed upon argument, the party whose pleading is demurred to shall, unless the Court otherwise order, pay to the demurring party the costs of the demurrer."

Rule 198, provides for a successful demurrer to the whole of a plaintiff's statement of claim.

Rule 199, provides that "where a demurrer to any pleading or part of a pleading is allowed, in a case not falling within the last preceding rule, then (subject to the power of the Court to allow an amendment) the matter demurred to shall as between the parties to the demurrer

be deemed to be struck out of the pleadings, and the rights of the parties shall be the same as if it had not been pleaded."

It is said there is no settled practice under these rules; that application was made to the local registrar to sign judgment on production of an affidavit proving default in entering and giving notice, &c., under sub-sec. (a) Rule 195, and that he declined to act without an order.

Mr. Clement argued that he was in the same position as if he had argued the demurrer and had judgment in his favour.

This is no doubt so within the wording of the rule.

He further asks for an order to evidence the result as if judgment had been delivered.

Rule 199 says that the matter demurred to shall be "deemed to be struck out of the pleadings, as between the parties."

It is not quite clear what practice was intended to be followed, especially where, as here, only a paragraph is demurred to.

If a judgment had been given there would have been some direction as to payment of costs. Is it to be taken that they are to be paid forthwith? Then is judgment to be signed, or are the rules, taken together, to amount to a judgment or order entitling the parties to issue execution for costs? Should the Registrar accept an affidavit and strike out the pleading, or is the pleading to be taken as struck out? If taken as struck out, how is the Registrar to make up the copy of the pleadings for the use of the Court without evidence of the fact?

It seems to me, and I am permitted by my brother Osler, with whom I have conferred, to say he is of the same opinion, that it will be a convenient practice to apply to the Court, *i. e.*, Judge sitting for the Court, for an order to strike out the pleading thus demurred to, and directing as to payment of costs.

This order should be applied for on notice, when an amendment may possibly be allowed on terms, or further time may be granted if a case is made for such relief.



Ordinarily, the costs should not be made payable prior to the determination of the suit, although, unless good cause is shewn to the contrary, they should be payable to the party demurring in any event of the cause.

On the return of the motion the party in default will have no right to be heard as to the validity of the pleading. He will be in the same position as if he had argued the demurrer and judgment had been given against him. As the party whose pleading is demurred to, and who is willing to submit to the demurrer, may obtain an order to amend under Rule 196 from the Court or a Judge (probably Master in Chambers, and also probably *ex parte*) an application to amend, on motion for an order under rule 195, will be received with little favour.

I do not see any necessity for any interlocutory judgment being entered in any case. If the whole pleading is demurred to, the result will be a final judgment for want of a plea. If only a part is demurred to, that part disappears from the record, and the order to strike out provides for the payment of the costs.

This motion may be renewed on notice. The notice will be of an application for an order to strike out the paragraph demurred to, and for the costs of the demurrer and the application.

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NOTE.—The motion was subsequently renewed on notice, when the defendant appeared by counsel and a satisfactory explanation was given of the failure to set down the demurrer for argument. The defendant was then allowed to set down the demurrer upon payment of costs.

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## GORING V. CAMERON.

*Ejectment—Counter-claim—Rules 116, 127 (b), 168 O. J. A.*

In an action of ejectment, G., the landlady of the defendant C. intervened and appeared to the writ. C. did not appear until statement of claim delivered, when he appeared and joined with G. in the statement of defence. *Held*, that the appearance of C. was regular.

The defendant C. counter-claimed for damages in respect of a trespass by the plaintiff upon the lands in question, whilst he C. was in possession, and for an assault, &c.. whereby he was compelled to quit the premises.

*Held*, that the counter-claim was not joining another cause of action with an action for the recovery of land within the meaning of Rule 116, O.J.A.

*Held*, also, that the counter-claim should not be disallowed or excluded under Rules 127 (b.) or 168, O. J. A., on the ground of inconvenience, it not appearing that there would be any inconvenience: and

*Semble*, that the counter-claim was sufficiently connected with the cause of action to make it advisable that they should be tried together.

[November 1, 1884.—*The Master in Chambers.*]

[November 11, 1884.—*Osler, J.A.*]

THIS was an action for the recovery of land.

The writ was issued 9th June, 1884, against the defendant Cameron. One Mary Jane Goring intervened as landlady, and appeared to the writ on the 20th June, 1884. Statement of claim was delivered 3rd October, 1884, omitting from the style of cause the name of defendant Cameron (who had not then appeared). Defendant Cameron entered appearance, and gave notice thereof, on the 6th October. On the 10th October both defendants, Cameron and Goring, joined in a statement of defence, denying plaintiff's title and asserting title in the defendant Goring, and Cameron as her tenant, and further alleging that shortly before the commencement of the action the plaintiff began to harrass the defendant Cameron, who was in possession as such tenant, and so constantly and vexatiously annoyed him that he quitted the premises, and his co-defendant thereupon took possession.

The defendant Cameron, by way of counter-claim, repeated the allegations in the statement of defence, and forther alleged that, whilst in lawful possession with his wife and family, of said lands as such tenant, the plaintiff wrongfully entered and trespassed upon said lands, broke

down the fences, carried off the defendant's hay, which was in his possession thereon, and assaulted and beat him, and claimed damages therefore.

The plaintiff moved to take the defendant Cameron's appearance off the files, and to strike out his counter-claim.

*W. H. P. Clement*, for the plaintiff, in support of the motion. As to the appearance. The defendant Cameron having quitted possession of the lands, and allowed his landlady to intervene and defend, had no further *locus standi*, and was estopped from appearing to the writ, at any rate after the statement of claim was delivered. The plaintiff had a right to abandon him as he had not appeared. As to the counter-claim. It was necessary, under Rule 116, for defendant Cameron to obtain leave to deliver it before doing so, it having the effect of joining another cause of action with an action for the recovery of land, and being in direct contravention of the meaning and spirit of that rule: *Compton v. Preston*, 21 Ch. D. 138. Under any circumstances the counter-claim had no connection with the plaintiff's claim, and could not be conveniently disposed of in this action, and should be excluded or disallowed under Rules 127 (b.) or 168.

*E. H. E. Eddis*, contra, for the defendant Cameron. The appearance was regular at any time before judgment, and the plaintiff, by omitting the defendant Cameron from the statement of claim, was himself irregular.

As the counter-claim. No leave was required or necessary, it not having the effect contended for of joining another cause of action with one for the recovery of land. Rule 116 only applies to the joinder of causes of action by the plaintiff in his statement of claim, or by the defendant in his counter-claim. *Compton v. Preston* is a direct authority in favour of the counter-claim being allowed.

The counter-claim is intimately connected with the plaintiff's claim, and, as far as appears from the pleadings, can be conveniently tried in this action. At any rate, there being no affidavit to the contrary, inconvenience can-

not be presumed. He cited *Glass v. Glass*, 9 P. R. 14; *Dockstader v. Phipps*, 9 P. R. 204.

THE MASTER IN CHAMBERS.—Held that the appearance was regular, and that the plaintiff's statement of claim, by omitting the defendant Cameron from the same, was irregular; but gave the plaintiff leave to amend. He also held that the effect of the defendant's counter-claim was not to join another cause of action with an action for the recovery of land within the meaning of Rule 116.

That although a plaintiff cannot, without leave, join any other cause of action with an action for the recovery of land in his statement of claim (except such as the rules permit), nor can a defendant do so in his counter-claim, as was decided in *Compton v. Preston*, 21 Ch. D. 138, there is nothing to prevent a defendant in an action of ejectment counter-claiming for any cause of action subject to the same being disallowed or excluded under Rules 127 (b) or 168. The counter-claim in *Compton v. Preston* was disallowed on the ground that it claimed recovery of land and joined another claim with it, but the case shews that if the counter-claim had been confined to the claim for the recovery of land it would not have been objectionable, which was carrying the rule further than the defendant was contending for here.

He further held that he could not assume that any inconvenience would arise from the trial of the counter-claim in this action, and he considered that upon the pleadings it appeared to be sufficiently connected with the plaintiff's claim to make it very desirable that they should be tried together.

*Motion dismissed, with costs.*

The plaintiff appealed as to the counter-claim.

The appeal was argued by the same counsel.

OSLER, J. A., upheld the decision of the Master, and dismissed the appeal, with costs.

## KELLY V. IMPERIAL LOAN CO. ET AL.

*Costs—Payment of, pending appeal.*

The defendants being entitled by the judgment of the Court of Appeal to the costs of the action, obtained out of Court for suit the bond given by the plaintiff for security for such costs.

Before action on the bond, and pending an appeal by the plaintiff from the judgment of the Court of Appeal to the Supreme Court of Canada, one of the sureties on the bond obtained leave and paid into Court to the credit of this action \$400, the amount due on the bond, to abide further order. Upon the application of the defendants, the company, BOYD, C., directed \$200 of the \$400 to be paid out to their solicitors, upon the solicitors undertaking to refund the amount if the Supreme Court should vary the disposition of costs made by the Court of Appeal.

[December 15th, 1884.—*Boyd, C.*]

A mortgage action for redemption.

The plaintiff succeeded at the trial before Proudfoot, J., and the usual judgment of redemption was pronounced, from which the defendants appealed to the Court of Appeal.

The Court of Appeal reversed the judgment of Proudfoot, J., and dismissed the action, directing the defendant's costs, both in the High Court of Justice and in the Court of Appeal, to be paid by the plaintiff.

The plaintiff gave notice of appeal to the Supreme Court of Canada.

The plaintiff, who resided out of the jurisdiction, had, at the beginning of the action, filed the usual \$400 bond for security for costs. Pending the appeal to the Supreme Court, the defendants, in execution of the judgment of the Court of Appeal, obtained this bond out of Court for purposes of suit, but before any action was brought upon it, one of the sureties on the bond moved before the Master in Chambers for an order allowing him to pay into Court to the credit of this action \$400, the amount of the bond, to abide further order. This motion was opposed by the defendants. The Master made the order asked, and the money was paid into Court.

*Moss, Q. C.*, for the defendant company, appealed from the order of the Master, and contended that the money should



not have been paid into Court, but should have been paid to the solicitors for the defendants, upon the solicitors undertaking to refund in the event of the Supreme Court reversing or varying the disposition of costs made by the Court of Appeal. He cited *Atherton v. British Nation Assurance Co.*, L. R. 5 Ch. 720; *Merry v. Nickalls*, L. R. 8 Ch. 205; *Cooper v. Cooper*, 2 Ch. D. 492; *Morgan v. Elford*, 4 Ch. D. 352; *Wilson v. Church*, 12 Ch. D. 454.

*Wallace Nesbitt*, for the plaintiff and the surety, *contra*, contended that the money should remain in Court to abide the decision of the Supreme Court.

BOYD, C.—There is a contradiction as to the solicitor offering to give the usual personal undertaking, to refund the costs in question when the matter was before the Master. If that had been offered and given, the order for payment into Court of the \$200 representing the share of costs under the bond for security payable to the defendants, the company, should not have been made. I think that in all ordinary circumstances the practice should prevail here as it does in England, when the case is going to the Supreme Court of Appeal, of directing the payment of the costs below to the solicitor of the successful party, on his personal undertaking to refund, if the appeal succeeds.

I am aware of such a practice existing among solicitors, and where no suggestion is made against the solvency of the client, I am disposed to favour its recognition by the Court.

The party paying such costs has, if his appeal succeeds, recourse against his opponent, and also against the solicitor, whose undertaking may be enforced against his property and office. Upon the solicitor's personal undertaking, which he now offers, an order may now be made for the payment out of the \$200, and the costs of this application, and of the other costs mentioned in the Master's order appealed from, but not the costs of the application to him

MACDONALD V. NORWICH UNION FIRE INSURANCE  
COMPANY.*Production—Privileged documents.*

Among the grounds of defence set up in an action to recover the amount of a policy of insurance were, that the plaintiff's books had been falsified; and that the fire had occurred through the wilful negligence of the plaintiff. The defendants employed two experts to investigate the plaintiff's books and his conduct with respect to the fire, and these experts made reports. The defendants' affidavit on production set out as documents which they objected to produce: "Report of adjuster for Norwich Union Fire Insurance Society for counsel's opinion thereon," "Various memoranda taken by adjuster for preparation of report, and for information of counsel."

It was further stated in the affidavit that these documents were "privileged, being part of the defendants' case and prepared for the instruction of counsel, and prepared specially for this litigation and in contemplation thereof."

*Held*, on appeal, (reversing the decision of the Master in Chambers) that these documents were privileged from production.

[December 27, 1884.—*Rose, J.*]

THIS was an appeal from an order of the Master in Chambers directing a further and better affidavit on production.

The facts and the authorities cited appear in the judgment.

*Osler, Q.C.*, for the defendant, (appellant).

*Shepley*, for the plaintiff, (respondent).

ROSE, J.—The action is brought by the plaintiff as assignee of one McLean of a policy of insurance in the defendant company, covering a stock of goods in McLean's store.

The defendants employed two "experts" to investigate the books of account of McLean, and his conduct with respect to the origin of the fire, and these experts in due course made their reports. The defendants claim that these reports are privileged from production, but on motion of the plaintiff this question has been decided against them. Hence this appeal.

It was stated by counsel that among the grounds of defence set up by the defendants were two, viz., that the books had been falsified, and that the fire had occurred through the wilful negligence of McLean.

The affidavit on production is sufficient in form to entitle the defendants to claim that the reports are privileged from production.

Paragraph four is as follows: "That the same are privileged, being part of the defendants' case, and prepared for the instruction of counsel, and prepared specially for this litigation and in contemplation thereof."

The second part, "shewing documents in defendants' possession which they objected to produce," is as follows: "Report of Adjuster for Norwich Union Fire Insurance Society for counsel's opinion thereon. Various memoranda taken by adjuster for preparation of report and for information of counsel."

If these statements are true I have no doubt the reports are privileged. Indeed it was hardly argued to the contrary.

The case of *Jones v. The Monte Video Gas Co.*, 5, Q. B. D. 556, shews the grounds upon which a further affidavit on production may be ordered. Brett, L. J., at p. 558, says: "We have consulted all the other members of the Court of Appeal who usually sit and act, and we are of opinion that the Rule to be observed is as follows: either party to an action has a right to take out a summons that the opposite party shall make an affidavit of documents: when the affidavit has been sworn, if from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the Master or Judge is of opinion that the affidavit is insufficient, he ought to make an order for a further affidavit; but except in cases of this description no right to a further affidavit exists in favor of the party seeking production. It cannot be shewn by a contentious affidavit that the affidavit of documents is insufficient."

Mr. *Shepley* does not rely on any thing in the affidavit itself, or any admissions in the pleadings, but upon certain letters written by the defendant to Mr. Clarkson, who as assignee of another policy is plaintiff in a cotemporaneous proceeding.

I have read these letters, and am clear there is nothing in them to entitle the plaintiffs to the production of the reports. The letters in my opinion confirm the defendants' affidavit as to the statement that these reports were prepared with a view to impending litigation, and to be laid before counsel for an opinion. Indeed I would judge from the language used that they were written under the advice of a solicitor.

On the 24th of March, in the first letter to Mr. Clarkson, asking for information to enable the reports to be prepared we find the following closing clause: "As we know nothing certainly of this matter, but have heard certain rumours which may or may not be true, we have to advise you that whatever we may do will be without waver or prejudice." Several of the letters are written simply "without prejudice." The letter of 4th April "without prejudice to any rights the companies may have."

The letter of 26th April charges that the books have been mutilated.

The letter of 16th May states that "the insurance companies are not in a position to know the course of action to pursue until we make our report."

I think on this material the plaintiffs are not entitled to succeed.

The case was however argued on the broad ground as to the right of the plaintiffs to production of reports made by the skilled experts employed by the defendants to investigate the books of McLean, and the circumstances surrounding the claim, *i. e.*, McLean's own conduct.

Many cases were cited, which I have carefully examined, and as owing to the near approach of the sittings for trials at Toronto, it will not be practicable to review my opinion I have availed myself of consultation with several

of my brother Judges. They all agree in the result at which I have arrived.

The cases cited are: *Woolley v. North London R. W. Co.*, L. R. 4 C. P. 602; *Wheeler v. LeMarchant*, 17 Ch. D. 675; *Bustros v. White*, 1 Q. B. D. 423; *Parr v. London, Chatham and Dover R. W. Co.*, 24 L. T. N. S. 558; *Sichel and Chance's Discovery*, pp. 74, 79, 81; *Twycross v. Dreyfus*, 36 L. T. N. S. 752; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644; *Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556; *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co.*, 11 Q. B. D. 55; *Mahony v. National Widows' Life Assurance Fund (Limited)* L. R. 6 C. P. 252.

No case like the present is among them. I do not stay to point out the difference in each case. That will be manifest on perusal.

Companies have been ordered to produce reports of their agents as to matters complained of, being reports of acts of the company or their agents. An insurance company was called upon to produce reports of medical examiner and grounds on which the insurance contract was founded. Generally it may be said that where the fact sought to be discovered is one, which the defendant, if a person under examination before the Master, could be interrogated concerning and compelled to disclose, such fact must be disclosed even though contained in a report or other document furnished to the defendant by his agent. The knowledge of the agent for such purpose is the knowledge of the principal, and he could not refuse to make the discovery because the fact was ascertained by or through his agent.

No case, however, has been cited, and it seems to me it would be hopeless to attempt to find one, where the information which the defendant has obtained of the plaintiff's fraudulent acts or misconduct could be demanded by the plaintiff.

This is contrary to the well known and established rule, that a party is not bound to hand to his opponent his



evidence or names of witnesses to enable him to prepare answers to cover up his own misdeeds.

The reports in this case are said to be as to the books of McLean, and as to his conduct with reference to the origin of the fire.

If the defendant were a person or individual, and were on examination before the Master, could the questions be asked, "What evidence have you found in the books of mutilation or fraudulent entries? What evidence have you discovered as to my conduct with respect to the origin of the fire?" Or the following question: "You have had an expert examine my books. Did he find, and report to you, that I had mutilated them, or that the entries appeared fraudulent? 2nd. You have sent an agent to enquire as to my conduct in respect to the fire and its origin. What did he discover and report to you?" Could it be contended that such questions could be pressed, and answers required? It seems to me that is this case. If so, is it arguable?

Mr. Osler said he might as well hand his brief to the plaintiff's counsel, and allow the insured to have full opportunity to prepare himself for the cross-examination, as his cross-examination must largely be based on the information contained in the reports. I think this is so. If so, it is well settled the information cannot be obtained.

Why should it be asked for? The facts must be within McLean's knowledge for they are his own acts. The claim is either an honest or dishonest one. The books are either well and fairly or fraudulently kept. The fire originated by accident or by design.

If good faith has been observed, the reports reveal nothing to affect the plaintiff's claim. If the claim is based on fraud, the Court must not defeat the endeavours to discover the fraud.

As there could be no appeal, I asked Mr. Osler to send me the reports that I might examine them. Of course my opinion, based on such examination, would not be reviewable: See *Bustros v. White*, 1 Q. B. D. p. 423. I have them

before me. It has not become necessary to look at them as I have not come to the conclusion that the affidavit is defective.

In order, however, that no injustice might be done I have looked at them. They were made some time after the correspondence referred to closed, and bear on their face conclusive evidence of having been prepared in contemplation of litigation, and their contents confirm me in the view I have taken as to the impossibility of ordering reports of such a nature to be produced.

I have treated the plaintiff as occupying no higher legal position than the insured. It was not argued that he did.

The appeal must be allowed with costs to the defendants in any event of the cause, and the order of the learned Master reversed, with costs also to the defendants in any event of the cause.

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### MINKLER V. McMILLAN.

#### *Discovery—Partner—Rule 224 O. J. A.*

An action against an endorser of a promissory note, brought by a member of the firm of bankers who discounted it. The firm was composed of two members only, B. and M., who had dissolved partnership, and the action was brought after the dissolution in the name of M. only.

The Master-in-Chambers made an order under Rule 224 O. J. A. for the examination of, and the production of documents by B., as a person for whose immediate benefit the order was being prosecuted.

On appeal, ROSE, J., thought the evidence as to the interest of B. unsatisfactory, but refused to set aside the order of the Master, varying it, however, by directing that the examination of B. and his affidavit on production should not be used except for the purpose of discovery.

[December 19, 1884.—*The Master-in-Chambers.*]

[December 29, 1884.—*Rose, J.*]

AN action against the endorser of a promissory note for \$11,200, made by one Ross.

The note was discounted by the Elmira Banking Company, which was composed of the plaintiff and one Beavers. Before the commencement of the action Minkler and Beavers dissolved partnership, and the action was begun in the

name of Minkler alone, the writ being issued by Beavers as solicitor. The solicitor was afterwards changed by the plaintiff.

*Clement*, for the defendant, moved under Rule 224, O. J. A., for an order for the examination of and for production by Beavers as "a person for whose immediate benefit the suit was prosecuted."

*Millar*, for the plaintiff, contra.

THE MASTER-IN-CHAMBERS.—From the apparently inconsistent and contradictory statements of the plaintiff in his examination, I can only conclude that his partner Beavers is interested in the note sued on just as much as the plaintiff. It was the property of the firm, there has been no settlement between the parties, and his title would seem to consist in his determination to hold on to that portion of the assets he has got. It seems to me the plaintiff will have to account to Beavers for what he may have to recover, just as Beavers will have to account to the plaintiff for the part of the assets in Beavers' possession, and that by consequence Beavers is liable to examination and production under Rule 224. In a good deal that is stated by the plaintiff in this examination I think he takes a wrong view of his position, and the same of the affidavit of Mr. Beavers. I think each of them still legally interested in all the assets.

The plaintiff expressly states that there has been no division or settlement.

On appeal argued by the same counsel.

ROSE, J.—The evidence is most unsatisfactory. The cross-examination of the plaintiff would lead one to suppose that the note sued upon was a part of the assets of the firm called the Elmira Banking Company, and which he had appropriated notwithstanding his partner's protest.

The affidavit of his partner (Beavers) who apparently is not friendly to the plaintiff, if perfectly ingenuous, makes

it difficult to say that the action is for Beavers' immediate benefit.

The statement "I am not now directly interested financially in this action or in the note sued on herein or in the proceeds thereof," is no doubt strongly against the conclusion that the note is an asset of the company.

It may be that Beavers knows that the note has been paid as the defendant contends. If so, the statement would not be untrue, and for all I know his hostility to the plaintiff may lead him to be willing that he should fruitlessly sue the defendant and be mulcted in costs. If this is so he would be still not interested financially in the suit, and it may be the order should not stand for his examination.

On the other hand, the defendant may urge that the plaintiff and Beavers are colluding: that the change of solicitor is only to give colour to the apparent want of friendliness; and that both are interested in concealing the facts from defendant.

And yet I do not see why the defendant cannot obtain all the information he desires from Ross, who, it is said, lives in the same town.

I should have had much difficulty in making the order in the first instance, especially as the result may be to allow the examination to be used at the trial.

Beavers might even now be cross-examined on his affidavit on this motion, but there might be difficulty in having production, as the subpoena named in Rule 283 is a *subpœna ad testificandum*.

The defendant offered to have the order varied by inserting a direction that the examination should not be read at the trial against the plaintiff, but should, as well as the affidavit on production, be used for the purpose of discovery only.

With this variance the order may stand, and appeal dismissed as to the residue.

The costs to be to the defendant in the cause.

## RE WEST MIDDLESEX ELECTION CASE—JOHNSON V. ROSS.

*Ontario Controverted Elections Act—Costs—Interviewing witnesses before trial.*

A petition under the Ontario Controverted Elections Act, R. S. O. ch. 11, was dismissed, with costs.

*Held*, on appeal (reversing the decision of one of the taxing officers) that under secs. 97 and 100 of R. S. O. ch. 11, the respondent was not entitled to tax against the petitioners, the costs of interviewing before the trial persons named in the petitioner's bill of particulars as bribers and bribees.

[December 31, 1884—*Rose, J.*]

THIS was an appeal from the decision of the Taxing Officer allowing the respondent certain charges made for interviewing persons named in the petitioners' bill of particulars as bribers and bribees.

The petition, which was filed under the Ontario Controverted Elections Act, was dismissed, with costs.

*H. J. Scott*, Q. C., for the appeal.

*Johnston*, contra.

ROSE, J.—Section 97 cap. 11 R. S. O., provides for the payment of all costs, charges, and expenses of and incidental to the presentation of a petition under this Act, and to the proceedings consequent thereon, in such manner and in such proportion as the Court or Judge may determine. And by section 100 it is provided that "The costs may be taxed in the prescribed manner, but according to the same principles as costs are taxed between solicitor and client in the Court of Chancery." In this case, upon the particulars being furnished, the respondent's solicitor and an experienced clerk at once set about interviewing the persons named in the particulars, and being almost of necessity the petitioner's witnesses. On eleven separate days the interviewing continued for the purpose, as set out in the affidavit, of seeing the parties "in the said particulars mentioned about the charges made against them, and to get their statements."



The fees allowed for such services amounted to \$235, and disbursements to \$49.

I do not propose to review the discretion of the taxing officer as to the amounts allowed in each case. My review of his action will be as to the principle of allowance. See *Hill v. Peel*, L. R. 5 C. P. 172.

It struck me on the argument as a most dangerous practice to permit the interviewing of the parties named in the particulars, most of whom must in every case be supporters of the political party opposed to the party delivering the particulars, and I was anxious to find what view was taken of such conduct by the Judges in this Province, and in England, I accordingly availed myself of the privilege of conference with several of my brother Judges of well known experience in election trials, both as counsel when at the bar and subsequently in their judicial capacity. I find that there exists a very strong opinion that such action should not receive countenance. Indeed some think it would be in the interests of justice that no particulars at all should be given, that the parties should come down to trial not knowing the names of the witnesses to be called, and protection against injustice by surprise could be afforded by adjournment to meet the evidence, if a case for adjournment were made out.

In England I find Mr. Baron Martin in the *Bradford Case*, 1 O. & H. 30, stating the object of the rule limiting the time prior to trial within which delivery of particulars could be enforced, in the following words, p. 37: "It was then suggested that some limitation had better be made upon it, for that it would give an opportunity of tampering with the persons whose names were mentioned in the particulars, and getting them out of the way, and that it might do more harm than good; the consequence was that there was a limitation put upon it."

And in the *Wigan Case*, 4 O. & H. pp. 4, 5, Mr. Justice Grove made the following observations as to the way in which witnesses had been dealt with in getting up the case: "Both my brother Bowen and myself think that during

the course of a trial the plan of getting witnesses who are waiting to be examined, poor ignorant men who do not know which side to please or displease, into a room alone with a solicitor, and examining them, is extremely reprehensible. Even before the trial, dealing with witnesses of the other side I do not say never should be done, but it should be done with great caution, and it would be certainly advisable not to do it in solitude. It is as I have said, exceedingly reprehensible, and a thing which does not tend to the furtherance of justice, and which does a great deal of harm in every way."

And in his judgment, Mr. Justice Grove said further, as to this: "There is another matter, which is incidental, upon which I think it is important to express my opinion, and that is, the question of getting witnesses who have been subpoenaed, or are likely to be subpoenaed by the opposite side, to make statements, and in some cases getting them to sign already prepared statements. This is not the first time that it has been done. This is the third election case in which it has been done within my personal experience, but it has never been successfully done, and it is, I believe, useless to the parties. The parties suppose because a man has made one statement to one party and he afterwards makes another statement to the other, that the Court are bound to discard his evidence altogether. That is a mistake. \* \* but it does not at all follow that because a man has made a statement which may be corroborated by circumstances or which may be corroborated by his demeanor, so that the Court conscientiously believes its truth, that his evidence is to be disbelieved and thrown out of the case because he has been got to sign a statement opposing what he originally said."

The result of these opinions is, that the interviewing and taking statements of persons who have been or are likely to be subpoenaed by the other side is improper and in most cases useless.

In *Hill v. Peel*, L. R. 5 C. P. 172, the Court placed its interpretation upon the rule as to taxation.

In that case were considered the costs in the cases of Sir Robert Peel, Sir Henry Lytton Bulwer, and the Right Honorable Russell Gurney.

The judgment of the Court was delivered by Bovill, C. J. At p. 180 he says, "The order for costs in each of these cases was general and without qualification on either of the grounds mentioned in this section of the Act of Parliament; and it therefore appears to us that the parties entitled to their costs under the orders were entitled to an indemnity for all costs that were reasonably incurred by them in the ordinary course of matters of this nature, but not to any extraordinary or unusual expenses incurred in consequence of over caution, or over anxiety as to any particular case, or from considerations of any special importance arising from the rank, position, wealth, or character of either of the parties, or any special desire on his part to insure success. We think also that such extraordinary costs as an attorney would not be justified in incurring without distinct and special instructions from his client ought not to be allowed; nor the costs of purely collateral proceedings upon which a party has failed; nor those which may have been occasioned by his default, negligence, or mistake."

It will be evident that the amount of the costs of such proceedings would be limited only by the number of witnesses, the time at the disposal of the solicitor after delivery of particulars, and of such of his clerks as might be spared for such work, the territory to be traversed, and the assiduity of the interviewers.

Take as an extreme case, the Algoma case, in which the witnesses were scattered all along the northern shores of Lake Superior, past Sault Ste. Marie and Prince Arthur's Landing to Winnipeg. If the principle be admitted, what would there be to prevent a solicitor, immediately upon receipt of particulars, which in such a case must necessarily be a considerable time prior to the trial, starting from

Toronto with a numerous staff of experienced clerks and interviewing the parties named in the particulars, at an enormous expense. As it is well settled that the Court, on appeal, will rarely review the discretion of the taxing-officer on a mere matter of amount, once admit the principle of such action being proper and necessary, and the costs of election trials, now to most men enormously great, would become an intolerable burden.

If in the present case both sides have pursued the same course, the total costs will thereby have been increased by something over \$550.

Having in view that the time for delivery of particulars has been limited to a few days prior to trial (in England in most cases to three days) to prevent tampering with witnesses.

2. That the practice is not to be favoured, being in the opinion of some reprehensible, and in most cases useless.

3. That the costs would be in most cases a heavy item—I am of the opinion that no solicitor would be justified in incurring them without distinct and special instructions from his client.

On principles of public policy, and in accordance with the rules of practice above set out, I have no doubt these costs must be borne by the party for whose benefit they were incurred, and are not costs between solicitor and client to be taxed to the successful party.

The appeal must be allowed, with costs, and the bill remitted to the taxing officer to review his taxation by disallowing such items.

## RE MCCALLUM v. GRACEY.

*Prohibition—Division Court—Cause of action—43 Vic. ch. 8, s. 8-12, (O.)*

A promissory note was dated at Milton, in the county of Halton, 17th September, 1877, and was for \$100, payable three months after date at Milton, with interest at eight per cent. per annum. The amount claimed was \$149.50.

The maker died in the county of Essex, long after the maturity of the note; her will was proved in Essex, and the defendants, at the time of the action resided in that county.

The plaintiff having sued upon the note in a Division Court of the county of Halton: *Held*, that the death of the maker, the circumstances of her making a will appointing the defendants executors, and the proving of the will by the executors, were no part of the cause of action, which was complete before the granting of the probate:

*Held*, also, that the Division Court of Halton, which was sought to be prohibited, had jurisdiction by virtue of 43 Vic. ch. 8, secs. 8, 12 (O.)

[January 3, 1885.—*The Divisional Court.*

—*Common Pleas Division.*]

A MOTION for prohibition.

The action was brought in the First Division Court of the county of Halton, upon a promissory note for \$100 and interest, by the administratrix of the payee against the executor and executrix of the maker.

The facts of the case and the grounds of the motion appear in the judgment of Rose, J., *infra*.

*Aylesworth*, for the motion, cited *Watt v. Van Every*, 23 U. C. R. 196; *Noxon et al. v. Holmes et al.*, 24 C. P. 541; *In re Hagel v. Dalrymple*, 8 P. R. 183; *In re Fuller v. Mackay*, 2 E. & B. 573.

*Allan Cassels*, contra, cited *Friendly v. Needler*, 10 P. R. 267, and the Division Courts Act, 1880, ch. 8, secs. 8 to 14.

ROSE, J.—This was a motion for prohibition to the Judge of the County Court of Halton, made before me in Chambers, and, at the request of the parties enlarged before the full Court sitting at the time, as each of the parties respectively desired to have the matter reheard, if my opinion should be adverse.



The action is on a promissory note made by one Mary Gracey in favour of Finlay McCallum, dated at Milton, 17th September, 1877, for \$100, payable three months after date at Milton, with interest at eight per cent. per annum. The sum claimed is \$149.50, with interest on \$100 since November, 1873.

The plaintiff is the administratrix of the payee, and the defendants the executor and executrix of the maker, who died long after the maturity of the note.

The ground of motion is, that the making of the will and granting of the probate are in issue, and the plaintiff must prove such facts, which occurred in the county of Essex, where the maker resided at the time of her death, and where the defendant resided, and therefore that the cause of action did not arise in Halton, as a material fact occurring in Essex must be proved by the plaintiff to enable her to succeed; and that the defendant residing out of Halton, the Court in Halton had no jurisdiction.

It is manifest that if the parties to the note were alive the question as to cause of action could not arise, and that at the time of the death of the maker a perfect cause of action existed in Halton.

Then is the fact of the death of the maker, her having made a will appointing executors, and the proving of the will by the executors, any part of the cause of action? I think not. I am aware that in *Noxon et al. v. Holmes et al.*, 24 C. P. 541, and in *Watt v. Van Every*, 23 U. C. R. 196, very broad language, taken from English decisions, is used, to the effect that a cause of action meant everything it was necessary for the plaintiff to prove to entitle him to succeed, in fact everything the defendant would have the right to traverse. This language must, however, be read with reference to the proving of the contract and breach between the original parties to the contract, for it is evident it is so used. If not so guarded it would seem somewhat too broad. For example: if a defendant in an action on a note made and payable in one county traverses the fact of his identity with the party making the contract

the fact might be that his birth took place in another county, where he continued to reside, and that he never resided out of such county. Would it be contended that because it became necessary for the plaintiff to prove the parentage and identity of the defendant, that these facts entered into the cause of action so as to determine that it did not arise in the county where the note was made? It seems difficult to think such a contention could be seriously urged, and yet, in my opinion, the argument must go that length, or the motion here must fail. The will and the probate clothe the executors with power over assets in all parts of the Province. The executors, as executors, may, in a certain sense, be said to exist in each county in the Province. Production of the probate is evidence of the grant.

The cause of action was complete before the granting of the probate, and we cannot think that the fact of the death, will, and probate had any effect upon the cause of action. The case of *In re Fuller v. Mackay*, 2 E. & B. 573, was referred to. This, and the case of *Murray v. The East India Co.*, 5 B. & Ald. 204, shew that a cause of action arising *after the death* of the testator, does not arise until the letters of administration. It is evident they do not assist us here.

Even if this view be not correct, it would seem that "The Division Courts Act, 1880," 43 Vic. ch. 8, sub-secs. 8 and 12 (O.), placed the question as to the jurisdiction of the Court in Halton beyond doubt.

Section 8 provides that "Where the debt or money payable exceeds \$100, and is made payable by the contract of the parties at any place named therein, the action may be brought thereon in the Court holden for the division in which such place of payment is situate, subject, however, to the place of trial being changed, &c.

Section 12 provides that "when it is by this Act provided that \* \* an action may be brought \* \* in any Division Court \* \* such Court shall have jurisdiction in the premises," &c. This language seems too

clear to allow any question to remain open, and in my opinion governs this case, for by contract the sum, over \$100, was made payable at Milton, where the action was brought.

I think the motion fails, and must be dismissed with costs.

CAMERON, C. J., and GALT, J., concurred.

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REGINA V. SCOTT ET AL.

*Certiorari*---Right of defendant to---32 & 33 Vic. ch. 31, sec. 71, (D.) and 33 Vic. ch. 27, sec. 2, (D.)

The defendants having been convicted by a Police Magistrate of an offence against the provisions of C. S. C. ch. 95, appealed to the Quarter Sessions, and the convictions were affirmed.

Defendants now applied for a *certiorari* to remove the convictions, notwithstanding that 32 & 33 Vic. ch. 31, sec. 71, (D.), as amended by 33 Vic. ch. 27, sec. 2, (D.), expressly takes away the right to *certiorari* where there has been an appeal to the Sessions.

*Held*, that where the magistrate has jurisdiction over the offence charged, and the right to *certiorari* is taken away, the Court cannot examine the evidence to see if the magistrate had jurisdiction to convict, and the *certiorari* was refused.

[January 12, 1885.—Rose, J.]

THIS was a motion for a writ of *certiorari* to bring up proceedings had before the police magistrate of the town of Chatham, upon which the defendants were convicted of publishing a scheme for the disposing of one of Bell's cabinet organs and other goods by chance, to-wit, by tickets, contrary to the provisions of ch. 95, C. S. C.

The defendants appealed to the Quarter Sessions, and the convictions were affirmed on the appeal.

The facts appear in the judgment.

Langton, for the motion.

Cartwright, for the Crown.

ROSE, J.—It was contended that 32-3 Vic. ch. 31, sec. 71, (D.), as amended by 33 Vic. ch. 27, sec. 2, (D.), did not take away the right to obtain a writ of *certiorari*, upon the ground of want of jurisdiction in the magistrate to convict, the evidence disclosing no offence.

It was not contended that the information did not disclose an offence within the jurisdiction of the magistrate, but that the decision in *Regina v. Dodds*, 4 O. R. 390, shewed that the evidence proved no such offence as was laid in the information and set out in the conviction.

The result would be, that although the magistrate might take the information, hear the evidence, convict upon the opinion that an offence was proved, and the Quarter Sessions might affirm such conviction, yet if, in the opinion of this Court, upon motion after proceedings were removed by *certiorari* the evidence disclosed no offence, the conviction might be quashed.

The statute would then, in effect, read: "No conviction or order affirmed, or affirmed or amended in appeal, *where the evidence warranted the conviction*, can be removed by *certiorari*," &c.

When it is remembered that on motion to quash a conviction the Court cannot review the finding on weight of evidence, and if there be *any* evidence cannot interfere because it seems insufficient, this argument is clearly insupportable, for by "any evidence" must be understood, any evidence shewing an offence.

The statute was passed to take away some right in case of an unsuccessful appeal. The right to have a conviction quashed after a return to a writ of *certiorari* depends upon want of form, want of jurisdiction, want of evidence disclosing an offence, &c.

It is said, where the magistrate had no jurisdiction over the offence the right to a *certiorari* is not taken away, though the statute deprives a party of it; but where jurisdiction over the offence existed no case has been cited in which it was decided that where the right was taken away, the Court might examine the evidence to see if the magistrate had jurisdiction to *convict*.

In *Regina v. Johnson*, 30 U. C. R. 423, the Court refused to quash the conviction, though it had been returned in compliance with the writ of *certiorari*, and no motion was made to quash the writ, though it was bad on several grounds. I refer to *Regina v. Levecque*, 30 U. C. R. 509

I have read the evidence, the carefully-prepared judgment of Mr. Houston, the police magistrate, and the conviction. I do not think anything is shewn to entitle the defendants to the exercise of any doubtful jurisdiction by this Court in their behalf.

It may be the defendants were well advised to try their chance of success by way of appeal, and not to rely upon their right to have the conviction quashed on motion upon return to a writ of *certiorari*.

This motion fails, and must be dismissed, with costs.

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## POWELL V. CITY OF LONDON ASSURANCE CO.

## POWELL V. QUEBEC INSURANCE CO.

*Jury notice—Omission to file—Effect of—Costs—Notice—Rule 406 O. J. A.*

The plaintiff omitted to file a jury notice with his last pleading, and applied *ex parte* to the Master-in-Chambers for leave to withdraw the last pleading and re-file it with a jury notice. The leave was granted.

*Held*, on appeal, that when the plaintiff came to the Court to be relieved from his slip, he should have been called upon to shew that the case was one which should be tried by a jury, and that unless he had been able to do so the defendants should not have had their statutory right to have the case tried by a Judge without a jury taken away.

*Held*, also, that notice of the motion should have been given to the defendant, in accordance with the spirit of Rule 406 O. J. A.

The appeal was treated as a substantive motion for leave to file the jury notice, and the order of the Master was affirmed, without costs.

[January 12, 1885.—*Rose, J.*

THIS was an appeal from an *ex parte* order of the Master in Chambers, allowing the plaintiff to take his last pleading off the file, and refile it with a jury notice, he having filed a jury notice with his first pleading, but, by inadvertence, not with his last.

The facts appear in the judgment.

*Millar*, for the appeal.

*Foster*, contra.

ROSE, J.—The motion before the learned Master was made on producing the pleadings on file, without an affidavit and without notice to the defendants.

The statute provides that unless a notice be filed (except in certain cases) the trial shall be before a Judge without a jury.

The plaintiff, by not filing his notice with his last pleading, was not entitled to have the case tried by a jury, and the defendants were entitled to have the case tried by a judge without a jury.

When the plaintiff came to the Court to be relieved from his slip, it seems to me he should have been called upon

to shew that the case was one which ought to be tried by a jury, and that unless he had been able to do so the defendants should not have had their statutory right taken away. It follows that notice should have been given to the defendants. I think this is in accordance with the spirit of Rule 406, requiring notice of motion in all cases, save as therein excepted.

If the defendant or party on whom the notice is served appear merely to ask for costs, costs can be refused, and so motions which should be of course will become practically so.

I have heard this motion as if it were an original motion, and not an appeal. I am unable to say that I should not allow the plaintiff to have the case tried by a jury. The defendants have, as usual, placed many defences on the record. Some of these can, I think, be as well tried by a jury as a Judge. If I were sitting when the case came on for trial I think I should prefer a jury. Fraud is charged. That is an issue that most Judges shrink from trying, and in many cases the jury are better acquainted with the probable surroundings than a Judge could be.

Although endeavouring to dispose of the matter as if it were before me in the first instance, I cannot forget that before the learned Master made the order he examined the pleadings, and came to the conclusion that a jury should be allowed.

With some little doubt, my own inclination is in the same direction. It may be the learned Judge at the trial may see something in the case that a jury cannot grapple with, but, with the assistance of questions this is not probable. If he does, no doubt he will fully protect the defendants.

The appeal must be dismissed. It is not a case for costs.

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## CAMERON V. CAMERON.

*Production of documents—Unsent letters.*

IN an action to establish a will, which the defendants impeached for want of testamentary capacity, and set up a prior will, the defendant included in his affidavit on production, copies of letters from himself to the testatrix, but objected to produce them for inspection on the ground that they were never mailed or sent to their destination. Their materiality and relevancy to the issues was not disputed.

*Held*, that all memoranda and writings, or pieces of paper with writing on which may throw light on the case, whether they would or would not be evidence *per se*, are subject to production, unless they can be protected; and the mere fact in the case of a letter that it was not forwarded to its destination is no ground of exemption. These letters were therefore ordered to be produced.

[January 15, 1885.—*Boyd. C.*]

AN action brought to establish one of the wills of Mrs. Unagh Bethune, made in 1883.

The defendants set up prior wills made in 1879, and impeached the first named will on the ground of want of testamentary incapacity.

The defendant Archibald Cameron made an affidavit on production, but objected to produce certain letters mentioned in the affidavit.

The Master in Chambers ordered that these letters should be produced.

*Huson Murray* for the defendant Archibald Cameron, appealed from the Master's order.

*A. H. Marsh* for the plaintiff, contra.

BOYD, C.—The defendant in his affidavit of production includes as Nos. 19 and 20 in the schedule, being as expressed letters or copies of letters from himself to the testatrix Mrs. Bethune, dated respectively 29th December, 1882, and 8th March, 1883, and objects to produce them for inspection on the ground that they never reached or were sent to their destination. After being examined he thus explains: "I did not send them because the opportunity did not arise. I was going to give them to her personally."

The general rule is, that documents included in the schedules, as relating to the matters in question, are to be produced, unless their production is sufficiently excused, and the only ground of excuse is privilege. The *onus* is on the defendant to satisfy the Court that these letters should be exempt from production. They are confessedly relevant to the issues, their materiality is not disputed; but it is said because they were not posted or handed to the person to whom they were addressed, and whose testamentary dispositions are now in question, they have never acquired the character of producible papers or documents. The Master has ruled against this contention, and before overruling the Master I must be satisfied that he is wrong. Mr. Murray's argument has failed to convince me that the Master is wrong. The case which helps him most is *Mattock v. Heath*, W. N. 1875, p. 201, in which Lush, J., refused to order discovery to be made of private notes, made by or for the defendant, of statements made by the defendant relating to the descent of the family. It was urged that it might be most material for the plaintiff to shew that the defendant had, at different times, made different statements with regard to the nature of his relationship. But Lush, J., refused an order, saying: "You are not entitled to discovery except of documents that you would have a *primâ facie* right to inspect. This is a mere memorandum made by or on behalf of the defendant. Can you claim to use private memoranda written by the opposite party for his pleasure or convenience?" The points of difference in that case and the present are, that that was an action of ejectment, and an application for discovery, but here these documents are in the shape of letters addressed to and intended for the testatrix. More like the present case is that of *Plumley v. Horrell*, W. N. 1868, p. 240, where the Master of the Rolls ordered diaries to be produced which were admitted to be relevant, and were not shewn to be privileged.

In *Mattock v. Heath*, the action was one of ejectment on a legal title. The defendant claimed to be heir-at-law

of the last owner, and so to be entitled to the land of which he was in possession. It was sought to make him disclose certain statements he had made relating to the descent of the family. In giving judgment, Lush, J., said: "the plaintiff and defendant do not claim here from a common ancestor; but are at issue upon the question who was the father of the intestate." It is manifest the Judge was adverting to the difficulty of ordering discovery of title of the adversary in actions of ejectment. This point is also brought out by the plaintiff's argument, who says that at all events he is entitled to an order, *i. e.*, setting forth the documents whether he could have inspection of them or not.

Having regard to the dates of the different wills it is evident that these unsent letters may have a most material bearing upon the validity of the defence, and no sufficient reason is alleged for their non-production. To indicate only one point they may bear most strongly upon the question as to the opinion the defendant had of the mental incapacity of the testatrix at that date. It is of course open for the defendant to explain or modify or get rid of the effect of these letters in any and every way admissible in evidence; and it should also be open for the plaintiff to make use of these writings, if so advised. I may refer to these cases: *Green v. Amey*, 2 Ch. Chamb. 138; *Bustros v. White*, 1 Q. B. D. 423; *Hopkinson v. Lord Burghley*, L. R. 2 Ch. 447; *Hutchinson v. Glover*, 1 Q. B. D. 140; *The Compagnie Financiere et Commerciale du Pacifique v. The Peruvian Guano Co.*, 11 Q. B. D. 55.

By the form of affidavit on production it is intended to embrace every form of paper or writing.

My conclusion may be expressed thus in the broadest way. All memoranda and writings, or pieces of paper with writing on which may throw light on the case, whether they would or would not be evidence *per se*, are subject to production unless they can be protected, and the mere fact in the case of a letter that it was not forwarded to its destination, is no ground of exception.

The appeal is dismissed, with costs.



NAPANEE, TAMWORTH AND QUEBEC RAILWAY COMPANY V.  
MCDONELL, ET. AL.

*Dismissing action—Want of prosecution.*

*Held*, that the filing of a statement of claim and an undertaking to speed is not a sufficient answer to a motion to dismiss. The delay must be sufficiently explained. In this case, being an action for a large claim against sureties, the plaintiffs not having in the opinion of the Court sufficiently explained, offered excuse for a delay of nearly two years, or shewn a probability of proceeding speedily, the action was dismissed with costs.

[January 23, 1885.—*Rose*, J.]

THIS was an appeal from an order of the Master in Chambers dismissing a motion to dismiss the action.

*McPhillips*, for the appeal.

*Lefroy*, contra.

The facts appear in the judgment:

ROSE, J.—The order made on the motion directed that the statement of claim filed pending the motion should be allowed to stand as good and sufficient, and gave the defendants the costs in any event.

The dates are as follows: Writ of summons, dated 13th March, 1882; served on McDonell, 31st March, 1882; served on Isbister, 13th December, 1882; appearance for McDonell, 10th April, 1882; appearance for Isbister, 16th December, 1882. There was the usual notice requiring delivery of statement of claim. Notice of motion to dismiss 18th October, 1884; filing of statement of claim, 30th October, 1884. There was accordingly nearly two years of delay to be explained.

It was urged that upon an undertaking to speed a motion to dismiss was seldom allowed, indulgence being granted on terms.

Reference to *Finnegan v. Keenan*, 7 P. R. 385; *Cotton v. Rodgers*, 7 P. R. 423, and *Bucke v. Murray*, 9 P. R. 495 will shew that such an undertaking is not, nor is filing a

replication, an answer to a motion to dismiss. The delay must be sufficiently explained.

It was further urged that Rule 203, O. J. A., vested a discretion in the learned Master, with which I should not interfere. No doubt a discretion is given by such rule, with which I would be loth to interfere, recognizing as I do the great learning and very large experience of the learned Master. However, on the appeal I granted an enlargement, to enable a cross-examination of the secretary of the company, whose affidavit did not seem as full as could be desired. I have that cross-examination before me, taken on the 13th inst.

He gives as one and a main reason for delay, that Stevenson, the contractor, for whom defendants were sureties, had left the country, and that plaintiffs were not in a position to procure his attendance as a witness.

It appears that the secretary has heard from Stevenson only once since he left, that he absconded, that under a writ of attachment plaintiffs seized all his goods and chattels; that he does not know where he is now, and adds: "I don't think we are in any better position to go on now, as far as getting Stevenson is concerned, than we were two years ago." He proceeds, "If this action is not dismissed and we can get Stevenson it is our intention to proceed to trial. I have not inquired in two or three months. I asked Mr. Caton within two or three months if he knew anything about him."

It appears that the proceeding with this action is dependent on obtaining Mr. Stevenson as a witness, that very little effort was made prior to this motion to ascertain his whereabouts, that since this motion was made either no effort at all or it was confined to asking one man if he knew where he was, and that to-day the plaintiffs are in no better position to proceed—he being their main and apparently indispensable witness—than they were two years ago.

The Court is asked to allow a claim against sureties of \$20,000, to be kept hanging over their heads, when there

is no apparent probability of the plaintiffs being able to prosecute the action. It does not seem from the examination of the secretary, that the plaintiffs' claim has a very firm foundation. Without attempting to form an opinion on that question one cannot help feeling that it is not at present clearly established even on plaintiffs' own shewing. On this material I cannot help feeling the plaintiffs have not sufficiently explained and offered excuse for the delay and shewn a probability of speeding the action. I think it more than probable on such evidence the learned Master would have come to the conclusion I have arrived at, namely, to dismiss the action, with costs.

ORDER.—Appeal allowed, with costs; and motion to dismiss granted, with costs.

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### PLUMMER V. LAKE SUPERIOR NATIVE COPPER COMPANY.

*Judgment—Foreign corporation—Liquidation—Rule 80 O. J. A.*

Leave was given to sign final judgment under Rule 80 O. J. A. against a company incorporated in England, having its head office there, and in process of liquidation there, but doing business and having assets and liabilities in Ontario.

[January 30, 1885.—Rose, J.]

THIS was an appeal from an order of the Master in Chambers refusing a motion for judgment under Rule 80, O. J. A.

The facts appear in the judgment.

*Shepley*, for the motion.

*Rae*, contra.

ROSE, J.—The only material before me is an affidavit verifying the debt and shewing the usual grounds to entitle plaintiff to judgment, and a chattel mortgage from the defendant company to one James Stevens and George M.

Rae, as trustees, to secure the payment of a sum of £10,000. It is alleged only a small portion of said sum has been advanced, to wit, about £4,000, and counsel for plaintiff states the plaintiff's desire to attack the mortgage.

The plaintiff would be entitled to his order, and, no doubt, would have obtained it but for the appearance of counsel for defendant company, who stated that a liquidator of the company had been appointed in England. The company is incorporated under the English Joint Stock Companies' Act.

I have nothing before me to shew when the appointment was made, what assets, if any, the company has in England, what liabilities to parties in England, what assets in Ontario, or what liabilities to parties resident in this Province. The indebtedness to this plaintiff is stated to be over \$10,000, about half of which is represented by a promissory note sued upon in this action.

The defendants' counsel asks that judgment be not given against the company, and that the action be stayed under and by virtue of the provisions of the Companies' Act of 1862, sections 87-89.

The company has obtained Letters Patent in this Province under 43 Vic. ch. 19, (O.)

The question is, whether a company incorporated in England having its head office there, doing business in Ontario, having, (as I assume,) large assets here, having liabilities here, and in process of liquidation in England, is liable to be sued in our Courts by creditors in this Province; or must our Courts stay all suits at the instance of the liquidator, allow him to collect the assets in this Province without asking the assistance of our Courts by proceedings taken to administer the assets here, or to enable creditors to prove claims and recover payment in this Province, and protect him while he withdraws such assets from this Province, takes them to England, and thus compel the creditors in this Province to prove their debts as best they may in England, and go there to receive their dividends.



Both counsel relied upon *In re Matheson Bros.*, (limited), 27 Ch. D. 225. In that case the Court asserted its jurisdiction under sec. 199 of the Companies Act, 1862, to wind up an unregistered joint stock company formed and having its principal place of business in New Zealand, but having a branch office, agent, assets and liability in England, although proceedings to wind up the company were pending in New Zealand, and stayed its hand only upon an undertaking by the solicitor for the English agent of the company, that the English assets should remain in *statu quo* until the further order of the Court. This undertaking was required *in order to secure the English assets until proceedings should be taken by the New Zealand liquidators to make them available for the English creditors pare passu with those in New Zealand.*

Mr. Justice Kay, in giving judgment, said : " This Court, upon principles of international comity, would no doubt have great regard to that winding-up order, and would be influenced thereby, but the question of jurisdiction is a different question, and the mere existence of a winding-up order made by a foreign Court does not take away the right of the Courts of this country to make a winding-up order here, though it would no doubt exercise an influence upon this Court in making the order." He adds : " Now, at this moment there are no proceedings pending to secure the assets here, nor has any application been made to the Courts of this country for that purpose; and in the meantime, however ready this Court may be to shew courtesy to the Courts of New Zealand, it does seem proper to interfere, and that sufficient reason exists for taking proceedings in order to secure the English assets."

In addition to the reasons which Mr. Justice Kay found in that case I find here a mortgage of the assets apparently the whole of the chattels in this Province, to one of the solicitors for the company in this Province. I find the liquidator and the defendant company represented by the same solicitor who is the trustee for the mortgagee. I confess to a little confusion of mind when I try to work out



these different interests so that harmony may prevail and no interference arise. Possibly if I knew all the facts I might be able to do so without difficulty. 'Certainly I know that nothing that could be deemed improper would be countenanced by the solicitor or his eminent firm, and yet I cannot exactly understand how in their hands the creditors in this Province are to be protected if in any way their interests clash or conflict with those of either the mortgagee, the liquidator, or the English creditors. These facts are known to the plaintiff, and I cannot blame him seeking to secure his claim upon the assets here before they are converted into money and taken to England. I think, in accordance with the spirit of the judgments above referred to, it is the duty of the Courts of this Province not, to delay or prevent such proceedings as may be necessary for such purpose.

Mr. *Shepley* referred to the language of Sir G. Mellish, L.J., in *re Oriental Inland Steam Co., ex parte Scinde Railway Co.*, L. R. 9 Ch., pp. 559-60, as to the effect of the 87th section of the Act of 1862. He says: "I quite agree that the 87th section of the Act of 1862, providing that no action shall be brought without the leave of the Court, and the 163rd section, enacting that no execution shall issue, apply only to the Courts in this country. Of course Parliament never legislates respecting strictly foreign Courts. Nor is it usually considered to be legislating respecting colonial Courts or Indian Courts unless they are expressly mentioned." The case of the *Carron Iron Co. v. Maclaren*, 5 H. L. Cas., p. 436, was also cited. It is most instructive, not only as to the question now before us, but also as to the jurisdiction of the Courts to grant injunctions against foreigners, and restrain those seeking relief in the Courts in England from proceeding for similar relief in the Courts of other countries.

The appeal must be allowed, and the order for judgment go. Costs of the suit, of the application before the Master, and of this appeal, to the plaintiff in the cause.

## SMITH V. GREEY.

*Commission—Evidence.*

A commission to take evidence out of the jurisdiction will not be ordered till after issue joined, nor then unless the applicant shews by affidavit what evidence he expects to obtain from the witness.

[February 23, 1885.—*The Chancery Division.*]

*H. D. Gamble*, for the defendant, appealed from the order of PROUDFOOT, J., in Chambers rescinding an order made by the Master-in-Chambers for a commission to Washington, D. C., to examine a witness on defendant's behalf.

*Arnoldi*, for the plaintiff, contra.

THE COURT dismissed the appeal, holding that a commission to take evidence should not be ordered in an action till after issue joined, and also that a commission should not be granted unless the party applying for it shews on affidavit what evidence he expects to obtain from the witness sought to be examined.

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 WHITE V. BEEMER.

*Master-in-Chambers—Local Master—County Judges—Jurisdiction of—Rule 422, sections 47 and 48 O. J. A.*

The Master-in-Chambers, and local Masters and County Judges, acting under Rule 422 O. J. A., have no jurisdiction under sections 47 and 48, O. J. A. to order references in opposed cases.

[March 4, 1885.—*Boyd, C.*]

*Edmison* appealed from the order of the local Judge, at Peterborough, purporting to be made under sec. 48 of the O. J. A., referring all matters in difference in the action for trial to an official referee, on the ground that the local Judge had no jurisdiction to make the order.

*G. Tate Blackstock*, contra.

BOYD, C.—The Master in Chambers is not clothed with power in respect to the referring of causes compulsorily under the Common Law Procedure Act. Now the provisions in the Judicature Act as to trials and references contained in secs. 47 and 48 are *in pari materia* with the reference clauses of the Common Law Procedure Act, and it was never intended that the Master should be able to act under the later and not under the earlier Act. This would be a most incongruous result, to avoid which I think it should be held that the Master has no jurisdiction to order any reference of the cause or of the issues in a cause in an opposed case. The question before me arises with reference to the jurisdiction of a County Judge sitting as local Master under Rule 422, and he has made an order purporting to be under section 48, referring all the matters in difference in the action for trial to an official referee. If the Master should not be allowed to deal with matters of reference under the C. L. P. Act, it is *a fortiori* proper to hold that he should not make orders under section 48, for by that means the findings of the referee become equivalent to the verdict of a jury, and perhaps can only be moved against before the Divisional Court: *Cooke v. The Newcastle and Gateshead Water Co.*, 10 Q. B. D. 332.

This is practically a reference of the cause, which could clearly not be done under the C. L. P. Act, and in my opinion it ought not to be done under the Judicature Act.

The order will be discharged, with costs to the defendant in the cause in any event.

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## THOMPSON V. FAIRBAIRN.

*Administration suit—Reference—Change of place of—Conduct of.*

An appeal from the order of the Master-in-Chambers changing the place of reference in an administration suit from Brantford to Walkerton, and giving the conduct of reference to the defendants, the executors, instead of the plaintiff, was dismissed with costs.

*Held*, that the reference in administration actions should *prima facie* be to the place where the person whose estate is to be administered resides. G. O. Chy. 638, governs the case, and the practice laid down in *Macara v. Gwynne*, 3 Gr. 310, is inapplicable.

During the argument before the Master, and on the appeal the solicitor for certain of the defendants other than the executors asked for the conduct of the reference in the event of its being taken from the plaintiffs.

*Held*, that the solicitor could not obtain the conduct of the reference unless by a substantive application.

The appeal was dismissed, without prejudice to a substantive application.

[January 19, 1885.—*Boyd*, C.]

AN action brought to set aside a will, which was tried before Boyd, C., at Walkerton, on the 4th June, 1884, and judgment pronounced for administration, and for a reference to the Master at Brantford.

The defendants, the executors, and the churches applied to the Master-in-Chambers for an order changing the place of reference from Brantford to Walkerton, and giving the applicants the conduct of the reference in lieu of the plaintiffs.

The defendants, the corporation of the village of Teeswater, consented to the order asked.

The plaintiff and the other defendants opposed the application, and these other defendants asked, during the argument of the motion, for the conduct of the reference in the event of the plaintiff being deprived of it.

The affidavits filed by the executors shewed that the testator had lived at Teeswater, 16 miles from Walkerton: that his property was at or near there: that they proposed calling seven witnesses who resided at Teeswater or Walkerton: that if the reference was to Brantford these witnesses would be absent about three days, if at Walkerton one day, effecting a saving to the estate: and that the



plaintiffs' solicitor was largely indebted to the estate. They also filed an affidavit of the widow of the testator (one of the plaintiffs) stating that owing to her age and physical infirmities it would be much more convenient for her if the reference was to Walkerton.

The plaintiffs' solicitor filed his affidavit in answer, stating that the accounts were short and simple, and that a large portion of the estate consisted of mortgages on property near Brantford.

The solicitor for the defendants opposing the application filed his affidavit, stating that the executors had no personal interest in the estate, that he intended to call two witnesses from Toronto, and perhaps two from Woodstock; that he represented three-fourths of the estate (\$45,000); and that either Brantford or Walkerton would be more convenient as a place of reference than Toronto.

The Master-in-Chambers made the order asked by the executors changing the place of reference to Walkerton, and giving the executors the conduct of it.

*George Kerr*, for the defendants other than the executors, the churches, and the village of Teeswater, appealed from this order, also asking that his clients should have the conduct of the reference.

*W. H. C. Kerr*, for the plaintiff.

*Hoyles*, for the executors and the churches, and *Holman*, for the village of Teeswater, contra.

BOYD, C.—Affirmed the order of the Master, holding that the case was governed by G. O. Chy. 638: That the reference in administration actions should *prima facie* be to the place where the person whose estate is to be administered resided, and that the practice laid down in *Macara v. Gwynne*, 3 Gr. 310, and other cases, viz., that the reference should *prima facie* be where the proceedings were instituted, was inapplicable to cases of administration. As to the proposition of the appellants that they should have the conduct of the reference, he held that



they had no *locus standi*, and did not come within Rule 427, O. J. A. The proper course for the appellants would have been to serve a substantive notice of motion asking for the conduct of the reference, to which the executors might have shewn cause.

Appeal dismissed, without prejudice to appellants making a substantive motion for the conduct of the reference.

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### RYAN V. CANADA SOUTHERN RAILWAY COMPANY.\*

#### *Local Judge of High Court—Jurisdiction—Rescinding orders.*

The plaintiff's solicitors lived at Sandwich, and the defendant's solicitors at Toronto.

The local Judge at Sandwich in November, 1884, made an *ex parte* order for leave to the plaintiff to amend the writ of summons before service, and subsequently set aside his own order on the defendant's application, on notice to the plaintiff and after argument by counsel on behalf of both parties.

The plaintiff appealed from the second order to a Judge in Chambers at Toronto.

*Held*, that the local Judge had no power to make the rescinding order under Rule 422, O. J. A.

Subsequently the defendants made a substantive motion before the same Judge in Chambers at Toronto, to set aside the original order of the local Judge.

*Held*, that save as excepted, a local Judge of the High Court in proceedings in the High Court having the same power in Chambers as a Judge of the High Court in Chambers as to the matters referred to in the Judicature Act Rules, he is a Judge of co-ordinate jurisdiction with a Judge of the High Court in Chambers. A Judge of the High Court has, therefore, no power to review the decision of a local Judge, save by way of appeal in the manner provided by the Judicature Act Rules; and that this motion could not be treated as an appeal as it was too late under Rule 427, O. J. A.

[February 14, 1885, and March 13, 1885.—*Rose, J.*]

THE local Judge of the High Court at Sandwich, having in November, 1884, made an *ex parte* order allowing the plaintiff to amend the writ of summons before service thereof, by substituting another person for himself as plaintiff, the defendants moved against the order on

\* An appeal from the two decisions of *ROSE, J.*, in this case, was dismissed by the Common Pleas Division on the 23rd May, 1885.

notice to the plaintiff, and the local Judge himself rescinded it after hearing arguments by counsel on behalf of both parties.

The plaintiff then appealed to a Judge in Chambers at Toronto, on the ground that the local Judge had no jurisdiction to make the rescinding order, for, although he had power under Rule 422 O. J. A., to make the original order *ex parte*, yet he had no power under Rule 422 (a) to make the second order, because the solicitors for the defendants did not reside in Sandwich but in Toronto.

*Aylesworth*, for the appeal.

*H. Symons*, contra.

ROSE, J., allowed the plaintiff's appeal, and set aside the rescinding order, holding that the local Judge had no jurisdiction to make it.

The defendants then made a substantive motion before the same learned Judge in Chambers, under Rule 406 O. J. A., to set aside the original *ex parte* order of the local Judge.

The same counsel appeared.

ROSE, J.—This is a motion to set aside and rescind an order of the local Judge of the High Court at Sandwich, made in Chambers.

Mr. Aylesworth objected that sitting in Chambers I had no power to set aside the order made in Chambers, and secondly, that if this was an appeal it was too late.

Section 36, O. J. A., gives to the Divisional Court the power to set aside the order of a Judge of the High Court in Chambers.

Section 76 appoints Judges of the County Court, "Judges of the High Court for the purposes of their jurisdiction in actions in the High Court."

By Rule 422 the local Judges of the High Court have their power and authority defined, and they are declared

as to actions brought in their own counties to "have the same power and authority in the action as the Master-in-Chambers," with certain exceptions; and by rule 420 and rule 548 the Master-in-Chambers has given to him power and authority to do such things as theretofore a Judge in Chambers had done save as excepted.

The result is that save as excepted the local Judge of the High Court, in proceedings in the High Court, has the same power in Chambers as a Judge of the High Court in Chambers as to the matters referred to in such rules.

It was not denied that a Judge in Chambers had no power to set aside the order of another Judge of co-ordinate jurisdiction made in Chambers. See *In re Allen, et al.*, 31 U. C. R. 458, and *Damer et al v. Busby*, 5 P. R. 356, as to the power of Court to review the action of a Judge in Chambers. Rule 482 provides that a vacation Judge may set aside his own order.

I do not see how I have power to set aside the order in question.

The judgment of Ferguson, J., in *Coleman v. Gilbert*, delivered in Chambers on the 10th inst., has been handed in. The order there was to set aside an order of the local Master at Belleville and certain amendments made thereunder.

Under rule 422 a local Master, who does not practise as a barrister or solicitor and who has not taken out a certificate to practise, has in regard to causes and actions brought in his county in the Chancery Division, (in addition to his power as a local Master) the jurisdiction, power and authority given to the County Court Judge, whose jurisdiction is by that section confined to causes and actions in his County in the Queen's Bench and Common Pleas Divisions.

It may be that the power of a Judge of the High Court in Chambers to set aside the order of the local Master is no greater than his power to set aside the order of the local Judge.

I have referred to my brother Ferguson, who has kindly read to me his very full notes of the argument in *Coleman v. Gilbert*. He has no note of any objection to his jurisdiction to hear such a motion, or to make the order there asked, and his recollection is that no such question was raised. He certainly has not considered or given any opinion upon the point.

I am therefore freed from any difficulty in considering the question thus expressly raised for my opinion.

It is clear that no appeal lies in this case, as under rule 427, by which an appeal is given from the local Judge, local Master or Master-in-Chambers to a Judge in Chambers, notice of such appeal must be given within four days, and the motion made within eight days after the decision appealed against, unless further time be allowed.

The order was made in November last, and no further time has been allowed.

I do not regret the result, as, so far as I have been able to consider the merits, I have not formed any opinion in favour of the defendants.

The motion must be refused, with costs in the cause to the plaintiff in any event of the cause.

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## MCCRANEY ET AL. V. MCLEOD ET AL.

*Attachment of debts—Money due under contract.*

McLeod contracted with Hawkins to erect a house, for which he was to receive \$1,225 ; \$300 when the frame was up, \$300 when the building was wholly enclosed, and the balance when the work was all completed. The building was to be completed on or before the 3rd of February, 1884. McLeod went on with the work and received the two sums of \$300, but he had not completed the building on the 3rd of February, 1884. He, however, continued the work till after that time, and until after the 1st of April, when the building being still unfinished, Hawkins entered, took possession, and completed it.

McCraney & Son, having a judgment against McLeod, obtained and served an attaching order and garnishing summons on Hawkins, the garnishee, on the 15th of March, 1884.

*Held*, that at the time of serving the attaching order no debt existed according to the terms of the contract, and no promise to pay had arisen by implication, and therefore there was nothing upon which the attaching order could operate.

[January 27, 1885.—*The Master-in-Chambers.*]

[March 3, 1885.—*Rose, J.*]

THIS was a garnishing proceeding, and the facts agreed upon by all the parties, in substance, were as follows :

Mrs. Hawkins, one of the garnishees, owned a piece of land at Niagara Falls, and the judgment debtor agreed with Hawkins, the husband of Mrs. Hawkins, in a written agreement between them, put in, to erect a house on the land, for which he was to be paid by Mr. Hawkins \$1,225 : that is \$300 when the frame was up, \$300 when the building was wholly enclosed, and the balance when the work was all completed. The building was to be completed within three months from the 3rd November, 1883, in a manner particularly specified by the agreement.

McLeod went on with the work, and became entitled to and received the two sums of \$300. He had not completed the building by 3rd February, 1884, when the three months expired, but proceeded with the construction of it not being interfered with in any way, until about or shortly after the 1st April, 1884, when, the building being still then unfinished, Mr. Hawkins entered and took



possession of the premises. And Hawkins then went on to complete the building, and with material and men completed it about the 1st May, 1884.

McCraney & Son issued a garnishing order on 14th March, 1884, served 15th March, on the garnishees, for the amount of a judgment recovered against McLeod, at that time and still remaining unpaid. No work on the building was done by McLeod, nor any material furnished by him after the 14th March.

The other judgment creditors duly garnished in the Fourth Division Court of the county of Welland, after Hawkins the garnishee had taken possession, and had finished the building, all moneys owing or accruing due to McLeod from Hawkins.

It was referred to the Judge of the County Court of the county of Welland, to ascertain what amount was due by said Hawkins to McLeod for the construction of the building; the said McLeod claiming for extras and the garnishee claiming damages for delay in construction and inferior work, as well as for the amount expended by the garnishee in completing the building. And the Judge thereupon found that after deducting said damages and the moneys expended by Hawkins for material and labour, Hawkins was indebted to McLeod in \$357.32½.

The contest here arose among creditors, upon the return of a garnishing summons, as to which of them should be paid, for there was not enough money to pay all.

*McClive*, for McCraney & Son.

*A. G. Hill* and *Echlin*, for the Division Court judgment creditors.

*Eddis*, for the garnishees.

THE MASTER-IN-CHAMBERS.—The result of my consideration of this case has led me to modify, in one respect, the opinion I entertained on the argument.

I think that, on the above facts, the garnishing order of McCraney & Son must be discharged, and that the gar-

nishing creditors in the fourth Division Court of Welland are entitled to be paid their claims in the order of priority of time in which their garnishing orders were served on the garnishee, that is, out of the \$357.32½, so far as it will go, each garnishing creditor to be paid his claim in full, or as far as the money will go, as he stands in that order of time, until the money is exhausted.

I take it that each garnishing creditor must stand upon the state of facts which existed at the time his garnishing order was taken out, and can only avail himself of those rights which McLeod then had against the garnishee: *Tate v. The City of Toronto*, 3 P. R. 181. And to apply that to the case of McCraney & Son. Their garnishing order was taken out 14th March, 1884, served on the following day. Now, at that time the special agreement between the judgment debtor and the garnishee was still open, and remained so for a fortnight afterwards. Nothing up to (say) the 1st April had occurred to vary the rights of the contracting parties from the terms of the written agreement between them. Then, on the 14th March, and from that time up to the 1st April, it is plain that McLeod had no claim against Hawkins, for the former had received all that he had become entitled to under the contract, and had failed to complete his contract, which was necessary to entitle him to the balance. But on the 1st April the garnishee took possession. That act alone would not entitle McLeod to any payment: *Munro v. Butt*, 8 E. & B. 738. I think that what occurred on that day, as evidenced by the conduct of the parties since, did entitle McLeod to compensation from Hawkins, as upon an agreement on that day. It was the intention, I think, of Hawkins, when he took possession on the 1st April, to compensate McLeod for what he had done, subject to his, Hawkins's, own rights; and McLeod's understanding of the transactions was similar, for in the first place it was right and natural that that should be so, and Hawkins and McLeod did afterwards submit it to the learned Judge of the County Court to take the account between them. Why

did they do that? It was a voluntary act, and, in my opinion, shows what the parties' intention was when Hawkins took possession. It was not understood that Hawkins was to have McLeod's labour for nothing, and so they desired that the true amount to be paid by Hawkins should be ascertained.

I cite some passages from notes of the learned editors of *Smith's Leading Cases*, 8th ed. vol. 2, notes to *Cutter v. Powell*. At page 20 it is said: "There is a numerous class of cases which establish the general proposition, that while a special contract remained open, *i. e.*, unperformed, the party whose part of it was unperformed could not sue in *indebitatus assumpsit* to recover a compensation for what he had done, until the whole was completed;" and *Hulle v. Heightman*, 2 East 145; and *Sinclair v. Bowles*, 9 B. & C. 92, with many other cases, are referred to. And at page 34 they continue: "Before leaving the first exception to the general rule, that while the special contract remained open an action of *indebitatus assumpsit* would not lie, it may be well to notice a large class of decisions forming only an apparent exception; that is to say, cases in which the special contract being unperformed, a new contract has been implied from the conduct of the parties to pay a remuneration commensurate with the benefit derived from the partial performance. Thus, if a ship owner contract to carry goods from A. to B. at a certain freight, and does not perform this contract, but the goods' owner voluntarily accepts the goods at a point short of the original destination, in such a manner as to raise an inference that the further carriage is dispensed with, a new contract will be implied to pay a compensation in the nature of freight, for that portion of the voyage which has actually been performed." And after referring to numerous cases in support of the above, they say: "In these cases, as is obvious, the freight *pro ratâ itineris* becomes due, not under the charter party, but by a new contract inferred from the conduct of the parties." On page 35 there are also remarks

on *Munro v. Butt*, 8 E. & B. 738, which I have cited above, which bear upon this matter.

I think consistently with these authorities that on the 14th or 15th March, McLeod had no right accruing or otherwise to any payment from Hawkins the garnishee and that any such right of McLeod against Hawkins arose on the 1st April, when Hawkins took possession with the understanding I have spoken of, upon an assumed contract between them entered into then.

It may be said that this reasoning is technical, and it is so. But the remedy by garnishment is surrounded by rules that are highly artificial, and when as here a contest arises among garnishing creditors as to their priority, it can only be determined strictly by those rules.

I discharge the garnishing order of McCraney & Son, with costs, and I order that the other garnishing creditors be paid out of the fund, in manner and in the order I have above indicated; the costs against McCraney & Son to be one half of the costs of this application. The other half of the costs of this motion to be equally divided among the remaining execution creditors, and added to their claim upon the fund. This latter order as to the Division Court executions I make because the learned Judge of the County Court desires that I should adjudicate on the whole matter, as do the parties.

Upon appeal from this decision argued by the same counsel.

ROSE, J.—I think the order of the learned Master is right, and that the appeal must be dismissed, with costs.

It is clear that at the time the attaching order was served there was no debt, *debitum*, upon which it could operate. The logical result of the appellants' contention would seem to be that immediately upon making a contract, or at least so soon as any work was performed upon it, an attaching order might be served, although there was no money due or owing, or which, according to the terms



of the contract would become due or owing for months, and that such order would operate upon the money representing the value of the work then done, so as to attach it when by virtue of other work being done and the time for payment having arrived a debt existed of which the debtor could have demanded payment had no order been served.

In this case the debtor had abandoned the contract and his employer had not entered upon the work at the time of the service of the order, so no debt existed according to the terms of the contract, and no promise to pay had arisen by implication from the employer accepting the benefit of the work done by the debtor.

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### BUDWORTH V. BELL.

*Security for costs—Penal action—Time for application for—C. L. P. Act sec. 71—Rule 429, O. J. A.*

In a penal action brought by a common informer, an order for security for costs under sec. 71 of the C. L. P. Act, was held to have been properly made after the statement of defence had been delivered, and after the parties had been examined, as authorized by Rule 429, O. J. A., but, *Held*, that the order should direct that security should be given "for the costs *to be* incurred in such suit or action," following the words of sec. 71.

[March 4, 1885.—*Rose, J.*]

THIS was an appeal from the order of the Master in Chambers ordering security for costs under section 71 of the C. L. P. Act, this being a penal action and the plaintiff a common informer.

The order was made at a late stage in the cause after statement of defence and after examination of the parties.

*H. T. Beck*, for the plaintiff.  
*Ogden*, contra.



ROSE, J.—The learned Master has acted under the provisions of Rule 429 O. J. A. The rule states that “In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such time or times, and in such manner and form as the Court or a Judge shall direct.”

Section 71 C. L. P. Act permits an order for security for costs in a penal action where the plaintiff or informer is not possessed of property sufficient to answer the costs of suit, the security to be for the costs to be incurred in such suit or action.

The authority for the order is the case of *Lydney and Wigpool Iron Ore Co. v. Bird*, 23 Ch. D., 358. The head note of that case is: “The old rule of the Court of Chancery, that an application for security for the costs of an action must be made promptly, is inconsistent with the provision of r. 2 of Order LV., that security may be given “at such time or times” as the Court may direct, and must be taken to have been abrogated. *Held*, therefore, that an application by a defendant for security for the costs of an action brought against him by a limited company might be made after reply and notice of trial.”

Rule 2 of Order 55, is in the same words as rule 429.

That case is certainly an authority, and the facts in this are not such as to lead me to desire to interfere with the Master’s discretion. If the plaintiff is a person without means, he should not have commenced the action unless he was prepared to give security for costs. If he do give security possibly he has derived a benefit from the lateness of the application and the defendant a corresponding injury. If he do not, the defendant will have more costs to pay than if he had applied earlier.

It was said that the order, a copy of which is not among the papers, is general in terms and not in the words of the statute. If so, it must be amended so as to direct security to be given “for the costs to be incurred in such suit or action.”

I express no opinion as to the meaning of the words of the statute, or as to whether they are in effect different from the words of the order; but the plaintiff is entitled to have the bond in the words of the statute. The Court will place a construction thereon if occasion requires.

Appeal dismissed, but as the plaintiff has derived a benefit therefrom, it will be without costs.

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FRIEDRICH V. FRIEDRICH.

*Solicitor—Settlement of action by parties—Fraud on solicitor—Solicitor's rights and remedy.*

The decision of FERGUSON, J., *ante* p. 308, was affirmed with this variation, that the solicitor who withdrew the writs was relieved from the payment of costs.

[December 18, 1884.—*The Chancery Division.*]

THIS was a rehearing of the case reported *ante* p. 308.

*Clement*, for the defendant.

*O'Sullivan*, for Mr. Mahon.

No one appeared for the plaintiff's solicitor.

BOYD, C.—In ordinary litigation it may be that the defendant will not be liable to the plaintiff's solicitor personally for costs in the event of a compromise, after judgment, between the parties, unless a case of fraud and collusion is established. But otherwise is the law in actions of alimony where the recovery of judgment by the wife conclusively establishes the propriety of the action, and creates a direct and personal liability on the part of the defendant to the wife's solicitor as for necessities supplied to her on the husband's credit: *Rice v. Shepherd*, 12 C. B. N. S. 332; *Ottaway v. Hamilton*, 3 C. P. D. 393.

Such is the present case, and the whole question is, whether the Court can grant a summary order against the

husband for the payment of costs, the parties having come together again as man and wife, and having directed a withdrawal of the writs of execution in the sheriff's hands. *Ex concessis* the husband would be liable to pay in an action, and I think his own conduct in the present case subjects him to the equitable jurisdiction of the Court. There being executions in the hands of the sheriff affecting lands which would enure for the benefit of the solicitor, his right of lien is interfered with and displaced by the withdrawal of the writs. As against the husband the costs of this litigation were ascertained and taxed, and his liability to pay the same is established by the judgment. It would not be proper to give a summary remedy for any costs incurred by the wife other than those in question in the action, because as to these other costs the husband should have the right to contest his liability in the ordinary way.

To this extent I approve of the order which is in appeal. If there is any dispute as to what is due to the solicitor in respect of these costs by reason of the non-application of payments which it is said the solicitor applied to costs in other proceedings, the parties moving are entitled to a reference to have the correct amount fixed by the Master, who will in that event dispose of the costs incurred before him.

I am reluctant to inflict costs upon the solicitor who intervened in the withdrawal of the writs of execution. He acted *bonâ fide* upon the instructions of his client, and it is not in accordance with modern practice to extend the cases in which professional agents are made to pay costs. The order in appeal should, I think, be modified by relieving the solicitor who withdrew the writs from paying costs, otherwise it will be affirmed, but without costs, as no one appeared to shew cause on the appeal.

PROUDFOOT, J., concurred.

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## BRICE V. MUNRO.

*Demurrer—Setting aside as frivolous.*

A demurrer to a statement of claim raised the question whether in an action against a shareholder living in Ontario, in a Quebec Joint Stock Company incorporated under the Dominion Joint Stock Companies' Act, 1877, it is sufficient to show a judgment and execution thereon returned unsatisfied in Quebec, or whether this must be shown in Ontario.

*Held*, that the demurrer was not frivolous,

*Semble*, the jurisdiction as to setting aside demurrers as frivolous, should rarely be exercised where the point is a new one, and is apparently raised in good faith to obtain the opinion of the Court.

[January 2, 1885.—*The Master-in-Chambers.*]

[January 12, 1885.—*Rose, J.*]

A MOTION to set aside a demurrer as frivolous.

The facts and cases cited appear in the judgments.

*Shepley* for the motion.

*Lash*, Q. C., contra.

THE MASTER-IN-CHAMBERS.—The plaintiff shews, in his statement of claim, a recovery of judgment in Quebec against the company, for a large amount, and a return of *nulla bona* to an execution against the defendants on that judgment. The company, it is averred, was formed under the Dominion Joint Stock Companies Act of 1877.

To that statement of claim in this action against the representatives of a shareholder in Ontario, for unpaid shares, there is a demurrer. It is contended that there must be a judgment against the company, and a return of *nulla bona* in Ontario, to warrant this action against a shareholder here.

I cannot think that it is so.

This is a Quebec corporation, with, presumably, its assets in Quebec. It is not plain that the corporation could be sued here by this plaintiff. The cause of action against the corporation may have arisen in Quebec, and if so, an action against it could not be sustained in Ontario for anything that appears; and if an action could be sustained, of what significance could be a return of *nulla bona* from any sheriff of Ontario, or of any province other than



Quebec. But whether this be such a case or not, it is plain that such a case may be, and in construing the statute it is necessary to contemplate the possible cases that may arise under it. A Quebec corporation (say) with all its assets in Quebec, may have shareholders in all the provinces of the Dominion, and the system of the Act of 1877 is arranged for the whole Dominion. It cannot be supposed that after an ineffectual judgment in Quebec, a plaintiff should be driven to sue the company again in each province in order to get a return of *nulla bona* in the particular province, to warrant an action against a shareholder there. What could be the value of such a return in the several provinces in most cases? Nothing whatever. It would really indicate nothing whatever of that which the statute contemplates in requiring a return of *nulla bona*. It cannot be that anything so clumsy and expensive can be intended, and no one must suppose that it can be assumed that the shareholders in the different provinces would be subject to the jurisdiction of the Courts of Quebec. It would not necessarily be so. Cases may be put where it would certainly not be so.

The statement of claim in this case shews a recovery of judgment at the seat of the company and a return of *nulla bona* there, and that is all that the very words and the spirit of the statute require. The other construction would add something to the statute, viz., that the return of *nulla bona* must be in the province where the action is brought against the shareholder, and would occasion very great expense. No good or plausible reason that I can see can be shewn for adopting it. It would certainly in cases that may be supposed be a denial of the remedy against the shareholders out of Quebec, altogether, for the 48th section relieves the shareholders from all liability to the creditors of the company, beyond the amount unpaid on their respective shares, to be recovered from them by such an action as the present, under the 47th section. That seems to me not only a strong argument, but a conclusive one. And as the very words of the statute are satisfied by



what is alleged in the statement of claim here, I cannot think the matter doubtful, and therefore I should set aside the demurrer as frivolous and unfounded.

On an appeal from the judgment of the Master, argued by the same counsel.

ROSE, J.—The demurrer is by the defendant, and the point he seeks to raise is, whether in an action against a shareholder in Ontario in a joint stock company, incorporated under a Dominion Act, it is sufficient to shew that judgment has been obtained and execution issued and returned unsatisfied in whole or in part in another province, without shewing that execution has been returned unsatisfied in whole or in part in Ontario.

The learned Master reserved judgment and gave his opinion in writing, expressed with his usual clearness and force, holding that the matter was not doubtful, and that he should set aside the demurrer.

Mr. Lash urged that a demurrer which commanded sufficient attention to require reservation of judgment, and a carefully prepared written opinion, and as to which there was no express decision, could hardly be called frivolous.

He further urged that in this case the learned Master had in fact heard and determined the demurrer in Chambers where counsel had not attended with argument as to its sufficiency, and that it was a hardship to deprive the defendants of having the demurrer remain on the record for the consideration of the Court.

It was also urged that the judgment of the province of Quebec or any other province was as to proceedings in this province a foreign judgment, and if the learned Master was correct in his interpretation of the statute it would be sufficient to shew judgment recovered and an unsatisfied execution in say the United States.

Mr. Shepley supported the order on the grounds therein taken, and cited the following cases: *Nixon v. Brownlow*, 1 H. & N. 405; *Penley v. The Beacon Assurance Co.*, 10

Gr. 422; *The Ilfracombe R. W. Co. v. The Devon and Somerset R. W. Co.*, L. R. 2 C. P. 15; *The Ilfracombe R. W. Co. v. Lord Poltimore*, L. R. 3 C. P. 288; *Rigby et al. v. Dublin Trunk Connecting R. W. Co.*, L. R. 2 C. P. 586.

In reply it was pointed out that in England proceedings were upon *sci. fa.*, being a proceeding upon a judgment and issued only with the leave of the Court, obtained upon shewing that all necessary steps had been taken to exhaust the assets.

It is clear that none of these cases decide the precise point in question, although it may be that the application of the principles there laid down may prove fatal to the defendant's contention. As to this, I express no opinion.

In *Nixon v. Brownlow*, 1 H. & N. 405, the company had its principal place of business in Ireland. The proceeding was by *sci. fa.*, in England, on a judgment in England, an execution issued in London having been returned *nulla bona*. The court held the plaintiff entitled to proceed with his action. There was done, what the defendants contend should be done here, *i.e.*, execution in the country where proceedings were instituted against the shareholder. In *Penley v. The Beacon Assurance Co.*, 10 Gr., at p. 425, the language of Spragge, V.C., is: "I am not prepared, at present at least, to go the length of saying that the plaintiff is bound to shew more than that he cannot, with all due diligence, obtain satisfaction from the effects of the company, within the jurisdiction of the Court. I am aware that in *Hitchins v. The Kilkenny, and Great Southern and Western R. W. Co.*, 15 C. B. 459, the defendants negatived the existence of any property or effects of the company in Ireland, as well as in England; the company having been established for the purpose of making a railway in Ireland, but having its place of business in England, information upon both points having been furnished by the secretary of the company; but the Court made no comment on the fact."

I have set out the points taken at some length to shew that while the view of the learned Master as to the suffi-

ciency of the demurrer may be entitled to prevail, certainly something may be said against it.

In *Dalton v. McIntyre*, 1 Dowl., at p. 77, the Court, on a motion to set aside a demurrer as frivolous, said: "If there be so much doubt as to render it necessary to cite so many authorities we cannot set aside the demurrer as frivolous." In that case, apparently, three cases were cited.

It seems to me the jurisdiction as to setting aside demurrers as frivolous should rarely be exercised where the point is a new one, and is apparently raised in good faith to obtain the opinion of the Court. Where it is evident that the party demurring is raising a question manifestly insupportable, not admitting of argument, is in fact trifling with the Court, either through gross ignorance or desire for delay, it may be convenient to at once set aside the demurrer.

The case of *Undershell v. Fuller*, 1 C. M. & R. 900, affords a fair illustration of what I desire to express. There the declaration stated a promise to the plaintiff and A. B., now deceased, in his lifetime; and in a second count stated that the defendant was indebted to the plaintiff and the said A. B. in his life time, but did not aver that he was deceased. The defendant having demurred to the second count, the Court held that the demurrer was frivolous.

In former times a demurrer on the record was a means of obtaining time, or delaying the proceedings. With the facilities for setting down and arguing demurrers under the present practice there is very little time gained by demurring.

I adopt the language of the Court in *White v. Woodward*, 4 C. B. 757, and say that "without pronouncing any opinion as to the sufficiency of the declaration, it is enough to say that this demurrer is not so clearly frivolous as to warrant its being set aside."

The appeal must be allowed, with costs to the defendant in any event of the cause, and the order of the learned Master reversed, also with costs to the defendant in any event of the cause.

(a) See *Brice v. Munro*, 7 O. R. 435, where, after argument, the demurrer was allowed.

## MOXLEY V. CANADA ATLANTIC RAILWAY CO.\*

*Affidavit of documents—Material for motion for better affidavit.*

The usual affidavit on production of documents, made by an officer of the defendants, contained a statement that the defendants objected to produce their repairs book and train register, but that they would produce such portions of the books “as are relevant, for inspection at the offices of the company;” and a further statement that the company had “sealed up such parts of the said books as do not relate to the matters in question in this action.” At the trial the plaintiffs called as witnesses the train despatcher, locomotive engineer, and an engine driver of the defendants. The presiding Judge refused on the evidence then given to direct the books to be unsealed.

*Held*, that the evidence taken at the trial was not proper material upon which to make an order in Chambers for a better affidavit on production.

*Held*, also, that as such evidence did not satisfy the Judge at the trial that he should direct the books to be unsealed, a Master or Judge in Chambers should not have been called upon to pass an opinion on the same evidence to accomplish what the plaintiff at the trial failed to do.

*Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556, considered.

[February 11, 1885.—*Rose, J.*]

AN appeal from an order of the Master-in-Chambers, directing a further and better affidavit on production by the defendant company.

The facts are as follows:

The affidavit was made by one Adam G. Pedue, the acting Superintendent and General Freight and Passenger Agent of the defendants.

By the affidavit the defendants objected to produce the repairs-book and train-register, but produced such portions of the books “as are relevant for inspection at the offices of the company;” and further stated that the company had “sealed up such parts of the said books as do not relate to the matters in question in this action.”

Clause 5 *a.* of the affidavit states, “No portion of the parts of said books so sealed up relate to the said matters in question, or any of them.”

In the schedule are given “extracts from the repairs-book, shewing all entries from 1st August, 1884, to 27th August, 1884, inclusive,” and “extracts from train-register, shewing particulars of trains arriving on 19th August, 1884.”

\*An appeal to the Queen’s Bench Division from the decision of *ROSE, J.* was allowed, and the order of the Master-in-Chambers restored, May 27th, 1885.



The plaintiff went to trial, and called the train-dispatcher, locomotive engineer and engine-driver in the defendants' employ.

The defendants' counsel refused to allow the sealed-up portions of the books to be opened, and the Chief Justice of the Common Pleas Division, before whom the case was tried, declined, on the evidence offered, to direct the books to be unsealed.

The plaintiff thereupon obtained an adjournment, to enable him, if so advised, to move for a better affidavit on production, and he accordingly moved and obtained the order appealed from.

*Lefroy*, for the appeal.

*Clement*, contra.

ROSE, J.—The material upon which such an order can be obtained is as pointed out in *Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556, where Brett, L. J., at p. 558, uses the following language: "When the affidavit has been sworn, if from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the Master or Judge is of opinion that the affidavit is insufficient he ought to make an order for a further affidavit; but except in cases of this description no right to a further affidavit exists in favour of the party seeking production. It cannot be shewn by a contentious affidavit that the affidavit of documents is insufficient."

It does not appear in this case that either the affidavit itself, the documents referred to, or admissions in the pleadings furnish the material upon which to support the order.

What has been furnished is the evidence taken at the trial of the three officials above named; and it is urged that their examination furnishes evidence entitling the plaintiff to such order.

This argument is founded upon the following language,



in the judgment of Brett, L. J., in the above-cited case, at p. 558: "Another remedy, however, may be used by the party seeking production. He can administer interrogatories; and interrogatories properly framed may force a person to disclose what documents he has in his possession, and the party requiring production will thereby avoid committing any breach of the practice as to affidavits of documents."

I do not think this language, when read with what precedes, as above extracted, is any authority for saying that, after the answers to the interrogatories have come in, they may be used to enable the party seeking discovery to move for a better affidavit of documents, but rather that the information desired must be sought through such interrogatories, and requiring full answers thereto.

Cotton, L. J., in the same case, at p. 559, says: "I wish however, to remark that if the party seeking production is dissatisfied with the affidavit of documents, he may administer interrogatories, and thus obtain further information."

Is the plaintiff in any better position than if he had tendered on this motion the affidavits of the three witnesses whom he has examined? It would seem clear that such affidavits could not be received.

I, however, pass over these and other objections, and examine the evidence to ascertain if there is anything which can be received as displacing the oath of the assistant superintendent.

Counsel referred me to pp. 65, 67, 69, of the Train Despatcher's evidence; 75, 77, 98, of the Locomotive Engineer's evidence; 109, 110, 111, 119, 120-3, of the Engine Driver's evidence, as containing all that was material. On pp. 65 to 67 the evidence discloses an attempt on the part of counsel to have the train register's book opened, so that he might examine it, but this the Court declined to allow, and it further appeared that the witness did not make the entries in the book, nor would he swear to the correctness of the entries, nor did he give any evidence of his own knowledge as to whether the book contained any entries which "related to the matters in question or any of them."

I find nothing on pp. 75, 77, and 98, as to entries in the sealed up portions of of the book in question.

The evidence of the engine driver, pp. 122-3, shews that he neither wrote the entries in the book, nor did he see whether they were written, in fact that he could not write. The learned Chief Justice, on p. 123, remarks : " It is quite impossible now to say there is the entry."

Clearly on such evidence it would be equally impossible to say that the affidavit on production is untrue.

It struck me on the argument as a somewhat peculiar practice to move before a Judge in Chambers for a better affidavit on production, in the endeavor to have the books unsealed, with no more material than that before the learned Judge at the trial, and on which he declined to direct the sealed portions to be opened.

If it had been made manifest at the trial that the sealed portions of the books which were then in Court had contained entries that were evidence, or which the witness in the box should have been required to look at to enable him satisfactorily to answer the questions put to him, I suppose the learned Chief Justice would have ordered the books to have been unsealed for such purpose. Such evidence did not satisfy the learned Judge that he should so direct, and I do not think the learned Master or I should be called upon to pass an opinion on the same evidence, to accomplish what the plaintiff at the trial failed in doing.

A copy of the judgment of the Privy Council in the case of *Canada Central v. McLaren*, was furnished to me on the argument. So far as it applies, I understand it merely to decide that certain entries may be given in evidence. What the plaintiff has so far failed in proving is that the books contain such entries as would be admissible in evidence or which he would have a right to examine for purposes of discovery.

It may be that the suggestion as to the use of interrogatories in the case of *Jones v. Monte Video Gas Co.*, 5 Q.B.D. 556, might, in this country, be taken advantage of by exam-

ining the proper officer, and under a subpoena to produce, the books being brought into Court, the question might be raised on a motion as to the sufficiency of his answer.

I think the appeal must be allowed, and the order of the learned Master reversed. Costs in the cause to the defendants in any event.

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LYON V. MCKAY.

*Affidavit on production—Motion for better affidavit.*

The plaintiff in his affidavit of documents mentioned "other letters and papers filed herein, the particulars of which I cannot now depose to," and stated "that such documents were filed in this Court on the motion made by defendant for his discharge from custody, as I am informed and believe."

*Held*, that the plaintiff's affidavit was sufficient; and that the defendant must inspect the documents at the office where they were filed, or take the necessary steps to have them transmitted to the office of the Court at his own place of abode.

*Held*, also, that an affidavit to shew the incorrectness of the affidavit of documents could not be received, following *Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556.

[February 16, 1885.—*Rose, J.*

THIS was an appeal from an order of the Master-in-Chambers, refusing to direct the plaintiff to file a better affidavit of documents.

The objection was to the second schedule, shewing documents which the plaintiff stated he had had, but had not in his possession or power at the time of making his affidavit, viz.: "Letter from defendant to plaintiff, dated on or about October 23rd, 1884. Letter from defendant to plaintiff, dated on or about October 20, 1884; other letters and papers filed herein, the particulars of which I cannot now depose to."

Clause 3 of the affidavit stated that the documents were last in his possession or power on or about the 7th day of November, 1884; and clause 4: "That such docu-

ments were filed in this Court on the motion made by defendant for his discharge from custody by my solicitors, as I am informed and believe."

*Hoyles*, for the appeal.

*Clement*, contra.

ROSE, J.—The defendant contends that the plaintiff should have scheduled the letters.

The case of *Taylor v. Batten*, 4 Q. B. D. 85, is a complete answer to this objection.

In that case the defendant objected to produce "certain documents, letters, and correspondence which have passed between my legal advisers and myself," and "certain instructions to, and opinions of counsel," which "are numbered 50 to 76 inclusive, and are tied up in a bundle marked with the letter A, and initialed by me."

Huddleston, B., refused to make an order for a better affidavit, holding this a sufficient description. On appeal to the High Court (Field, J., and Huddleston, B.) the Judges were divided in opinion, and the plaintiff appealed to the Court of Appeal, (Bramwell, Brett, and Cotton, L. JJ.) The judgment of the Court was delivered by Cotton, L. J., The Court held this was clearly a sufficient description where no objection to produce was made, and that no more particular description was required where privilege from production was claimed.

He proceeds: "We must remember that the plaintiff is bound to take the affidavit as true, unless it can be shewn that there is some reason on the face of it why it cannot be relied on. The affidavit is sufficient if the documents are sufficiently identified. But it is said the plaintiffs are entitled to be put in such a position as to test the truth of the affidavit by the description of the documents. That, however, is, in our opinion, erroneous. The only object of the affidavit is to enable the Court to order the documents to be produced, if it think fit to make an order to that effect; and if words are used which, if true, protect the



documents, no further particularity is necessary than in the case of documents for which protection is not claimed."

Referring to *Fortescue v. Fortescue*, 34 L. T. 847, he says: "If the decision was, that the plaintiff was entitled to a detailed schedule shewing the nature of the defendant's title deeds, we should not agree with it. But that was not the decision." He closes the judgment as follows: "The principle of our decision is, that the object of the affidavit is to enable the Court to make an order for the production of the documents mentioned in it, if the Court think fit so to do, and that a description of the documents which enables production, if ordered, to be enforced, is sufficient.

It was further objected that the plaintiff was in fault in describing the documents as being filed in this Court, *i. e.*, in Toronto; that as the defendant's solicitor lived in Belleville, the plaintiff should have sent the documents to Belleville and lodged them there with the proper officer, so that the defendant's solicitor might there inspect them conveniently and without expense.

This is not a ground of objection to the form of the affidavit, but, if tenable at all, is a ground for moving for inspection. If, however, the motion were for an order for inspection with the view of compelling production at Belleville the case of *Vivian v. Little*, 11 Q. B. D. 370 would, in my opinion, prevent the defendant succeeding.

In that case the documents were filed not in the Court in which the action was pending, but in the Court having jurisdiction in lunacy.

The Master made the order for inspection, which was set aside by Day, J., at Chambers, and the Court was moved to set aside that order. The judgment of Lopes, J., is brief, and I give it at length, as it answers the arguments offered before me. He says: "Suppose this Court were to confirm the Master's order for inspection, and set aside that of my brother Day, it would be unjust, for the defendant could not obey the order for inspection, because



he has not the deeds in his possession and cannot produce them. They are in the custody and control of a Court. It is said that he can make an application to that Court, and so get the deeds into his possession. But who wants the inspection? The plaintiff. If he wants it why is he to cast the onus of making the application on the defendant? I think that the proper person to apply is the plaintiff himself. Whether such an application would be successful or not I cannot say, being unfamiliar with the practice of the Court in lunacy; but I should suppose that the Court would unhesitatingly accede to it."

I have taken the trouble to dispose of this ground as if the application were for inspection, to save the defendant further costs in what appears to me an unsuccessful attempt to compel the plaintiff in this action to apply to the Court to transmit the documents to the proper officer in Belleville, or to apply for an order to take the documents off the files and to deposit them in the office of the Court at Belleville.

In my opinion the defendant must either inspect the documents here, or take the necessary steps to have them transmitted to Belleville for inspection there.

I was asked to receive an affidavit as to the incorrectness of the affidavit of documents.

The case of *Jones v. The Monte Video Gas Co.*, 5 Q. B. D. 556, shews that a contentious affidavit cannot be received. I have followed that case lately in *Macdonald v. Norwich Union*, ante p. 501, and *Mowley v. Canada Atlantic Railway Co. (a)*. The latter case is now standing before the Queen's Bench Divisional Court for argument by way of appeal, when no doubt the question will be fully considered, as also *Campbell v. McArthur et al.*, 7 P. R. 46, which is hardly consistent with the decision in *Jones v. The Monte Video Gas Co.*

The motion must be dismissed, with costs in the cause to the plaintiff in any event of the cause.

(a) Now reported ante p. 553.

## ONTARIO BANK V. BURKE ET AL.

*Judgment—Rule 80, O. J. A.—Notice of protest—Address.*

In an action against the maker and endorsers of a promissory note, in answer to a motion under Rule 80, O. J. A., for judgment, the defendants, the endorsers of the note, who it was said were accommodation endorsers, swore that they had received no notice of dishonour. The protest of the note was not produced by the plaintiffs on the first return of the motion.

*Held*, (on appeal from the Master in Chambers who ordered judgment,) that as there was no evidence that the defendants had received notice of dishonour, and a distinct denial by them of such notice, the motion should have been refused.

The protest having been produced after an enlargement.

*Held*, that being only presumptive evidence of the posting of the notices, it was not sufficient, in the face of the denial.

The note was dated "Prince Arthur's Landing," and since the making of the note the place so called was incorporated under the name of Port Arthur, the limits of the two places not exactly corresponding. One of the endorsers C. C. B. resided at Bowmanville.

*Held*, that the sufficiency of a notice addressed to C. C. B. at Port Arthur, was open to argument, upon which the defendant was entitled to have a trial, and on this ground judgment should not have been ordered.

[March 3, 1885.—*Rose, J.*]

THIS was an appeal by the defendants, C. C. Burke and D. F. Burke, from an order of the Master-in-Chambers directing judgment under rule 80.

The action was brought on a promissory note for \$15,000, dated at Prince Arthur's Landing, 18th September, 1884, payable one month after date at the Ontario Bank there, made by the defendant Marvin Burke, payable to the order of the defendant C. C. Burke, and endorsed by C. C. Burke and D. F. Burke.

The defendant C. C. Burke was the mother of the other defendants and resided at Bowmanville. The other defendants resided at Prince Arthur's Landing. Since the making of the note the territory known theretofore as Prince Arthur's Landing has been incorporated under the name of Port Arthur, the limits of the two places not exactly corresponding. Prince Arthur's Landing was not an incorporated place, and the Post-office, prior to the incorporation, was called Thunder Bay.

The facts further appear in the judgment.

*Holman*, for the defendant C. C. Burke, and *Smellie*, for the defendant D. F. Burke, for the appeal.

*Walter Barwick*, contra.

ROSE, J.—The only defence set up was want of notice of protest. This, of course, could not avail the defendant, Marvin Burke, the maker. The other defendants are, it is said, accommodation endorsers.

Each of the endorsers filed affidavits denying receipt of any notice of dishonour, but the learned Master expressing an opinion against them, the defendant C. C. Burke obtained an enlargement to examine the notary and his clerk. This was done under the authority of *Carta Para Gold Mining Company (Limited) v. Fastnedge*, 30 W. R., p. 880.

There Jessel, M. R., said: "As I read the *defendant's* affidavit there is no defence to this action \* \* \* \*  
But the defendant urges that there is a case to be tried and that he has a right to cross-examine the clerk. I think it is fair that he should, but only upon terms, have an opportunity of cross-examining."

Cotton, L. J., said: "I think the order proposed by the Master of the Rolls is right; not that I think there is any defence to this action, but it is right the defendant should have an opportunity of cross-examining the clerk, who swears that he posted the letter."

It is clear that before the defendant was driven to ask the indulgence it was made manifest that *on his own affidavit* he had no defence.

In the case before me the fact of notice is one to be proven. The production of the protest is presumptive evidence of the posting of the notices, but the defendants' affidavits state that the defendants never received them. It is clear from the defendants' affidavits it does not appear there is no defence.

In *Fell v. Williams*, 3 C. L. T., 358, the learned Chancellor is reported to have said, that in moving for judg-

ment under either rule 80 or 322, "The plaintiff's case must appear as a demonstration, and nothing is to be supplied by the imagination, or rest upon probability alone."

It is clear, therefore, that presumptive evidence in face of a denial of receipt of the notice would not be sufficient. I think, therefore, at this stage, the motion as against the endorsers should have been refused, and that the defendant C. C. Burke should not have asked for permission to examine the notary and his clerk.

It will be observed that in the *Carta Para Case* the cross-examination was of a deponent who had filed an affidavit on the motion, something that is almost a matter of course in our practice here (see Rule 283 O. J. A.), and probably only considered a favour in that case because the defendant had shewn by his own affidavit that he had no defence. Here there is no affidavit filed by either the notary or his clerk.

In this case the defendant C. C. Burke did cross-examine the notary and his clerk, and upon the return used it on the motion. It certainly was evidence filed by that defendant shewing that notice had been sent. If the case had rested there I should have had some difficulty in disposing of it. My present impression, however, is, that I should, upon the above facts, have thought that the fact was one to be determined upon contradictory evidence.

That defendant seeks to raise a further point, viz: that the protest shews that no notice has been sent to her. The notices were sent to Port Arthur. She resided in Bowmanville. The address on the note was Prince Arthur's Landing.

The Statute 37 Vic. ch. 47, sec. 1 (D), declares the notice to be sufficiently given if addressed in due time at the place at which the bill or note is dated, although the residence be elsewhere.

It is clear the notice was not addressed either to Prince Arthur's Landing or to the residence of the defendant. But it was answered the notice was sent to Port Arthur, which is the same place as that at which the note was dated.



It is not identically the place although it may include it. Mr. Holman illustrated his argument by supposing a note dated at Brockton prior to its annexation to the City of Toronto, and asked whether a notice sent after annexation to Toronto would be sufficient. It was not contended that it would. It is not necessary for me now to express an opinion upon the subject; it is sufficient to say that the question is one raised and is open to argument. I am not at liberty to decide it on this motion. It is open to argument and this is not the time to hear such argument. The defendant C. C. Burke is entitled to have her argument heard at the trial of the issues raised. On this ground the judgment should not have been ordered.

The defendant D. F. Burke was, I believe, not served at the same time as the other defendants, and the motion for judgment, as against him, did not come on at the same time. He did not join in examining the notary and his clerk. It is said he used their examination on the argument before the Master, but it was said in reply, not until after the Master had directed, after objections taken, that it might be used against him, when he commented on the evidence.

I do not think he is precluded by so doing from saying that the material before the Master shews an issue to be tried.

I wrote the above on the supposition that the protest had been brought before the learned Master as an exhibit. I have just had laid on my table the original application filed by the plaintiffs on the motion for judgment, this not having been lodged with the other papers used on the appeal.

I find only an affidavit by the plaintiffs' manager, verifying the endorsement on the writ of summons, and stating the claim to be on a note made by Marvin Burke, and endorsed by the other defendants.

There is no allegation of notice or of protest, save that the plaintiffs claim notarial charges.

This is clearly insufficient, and should not have been



acted upon. Apart from the examination of the notary and his clerk, there is no evidence of the defendants having received notice, and there is a distinct denial.

The appeal must be allowed, with costs of the motion below and of this appeal to the defendants C. C. Burke and D. F. Burke in the cause in any event. If judgment has been signed, and execution has issued, I do not set such proceedings aside, but they must be stayed, and they may stand as security until the determination of the issue. I do this as no merits have been shown except the legal question above raised, which, while technically a meritorious defence has as among the parties defending apparently not the slightest merit to commend it.

If the plaintiffs succeed in the event, the defendants must not pay any greater costs by reason of the judgment than if it had not been signed at this time. If they fail they must pay the defendants C. C. Burke and D. F. Burke all costs occasioned thereby.

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### HUGHSON ET AL. V. GORDON.

#### *Judgment—Rule 80 O. J. A.*

On a motion for judgment under Rule 80 O. J. A., in an action on a promissory note the defendant filed an affidavit showing that he was an accommodation maker and stating his information and belief to be, that the plaintiffs were aware of the fact, that they held the note as collateral security, and that they never gave any value for it, and further that since the making of the note M, the payee, had become insolvent and made an assignment and that there was litigation pending between the plaintiffs and his assignee in respect to certain securities alleged to be held by the plaintiffs on account of his indebtedness. An affidavit of the plaintiffs' manager in reply was filed, denying knowledge of the note being an accommodation one, and stating that it was discounted by the plaintiffs and the proceeds placed to M's credit.

*Held*, not a case in which judgment could be ordered.

[March 13, 1885.—*Rose, J.*]

AN appeal from the order of the Master in Chambers directing judgment under rule 80 O. J. A.

The facts appear in the judgment.

*Aylesworth*, for the appeal.

*J. H. Mayne Campbell*, contra.

ROSE, J.—The action is on a promissory note for \$400, made by the defendant in favour of one McKenzie, and by him endorsed to the plaintiffs.

To the usual affidavit by the plaintiffs' manager the defendant replies, setting out facts that in my opinion shew him to be as between himself and McKenzie an accommodation maker.

He also states, on the information of McKenzie and his book-keeper and his own belief, that the plaintiffs were perfectly aware of the fact that the note was given for McKenzie's accommodation without value or consideration, and on the information of McKenzie that the plaintiffs held it as collateral with other securities, and on his own belief that plaintiffs never gave any value for it. He further states that since the making of the note McKenzie has become insolvent, made an assignment for the benefit of creditors, and that there is litigation pending between his assignee and the plaintiffs, instituted to set aside certain securities alleged to be held by the plaintiffs on account of McKenzie's indebtedness to the plaintiffs.

To this the plaintiffs' manager replies denying knowledge of the note being an accommodation note. He ventures to swear as to the knowledge of the plaintiffs, and that absolutely without stating that he is merely pledging his belief. This is open to comment. He also swears that the note was discounted and proceeds placed to McKenzie's credit, and that on the strength of the security of such and other notes, endorsed to plaintiffs by McKenzie, the plaintiffs at various times supplied him with lumber, and that McKenzie is largely indebted to the plaintiffs.

He says nothing as to the litigation to set aside the securities.

I extract the following note from *MacLennan's* Judicature Act, 2nd ed., p. 220: "To entitle the defendant to defend he is only required to show a '*bonâ fide*' defence: *Andrews v.*

*Stewart*, 2 Charl. Ch. Ca. 20; to suggest a defence and shew some probability of getting it from the plaintiff, or proving it himself: *Harrison v. Bottenheim*, 26 W. R. 362; or reasonable ground for supposing that there is a 'plausible' defence: *Beckingham v. Owen*, and *Thorne v. Seel*, W. N. 1878, p. 215; or grounds for fairly disputing the claim: *Runnacles v. Mesquita*, 1 Q. B. D. 416; or that the matter is so doubtful that it ought to be allowed to go to a jury: *Andrews v. Stewart*, and *Beckingham v. Owen*, *supra*; *Anon.* W. N. 1876, 64; *Berridge v. Roberts*, W. N. 1876 p. 86, 2 Charl. Ch. Ca. 21.

I have had occasion lately, in one or two cases, closely to consider when judgment can be ordered under Rules 80 and 324. The case of *Ontario Bank v. Burke (a)*, will perhaps furnish the most striking illustration of how slight a contention is sufficient to raise a defence.

In this case, if the plaintiffs' manager is stating the truth either the defendant is not or he has been misled by McKenzie as to whether the note was given to plaintiffs as collateral security or for discount. No explanation is given as to why the plaintiffs do not furnish affidavits. The facts may lie in their knowledge and not within the knowledge of the manager. I am not satisfied even on this material how the facts are. It is not my duty to determine them. I think the defendant must have an opportunity of raising his defence and examining the parties before he is called upon to pay that for which he has received no consideration. The fact that he is willing to add heavy costs to the claim if he is unsuccessful is some evidence of *bona fides*,

I think this is not a case in which judgment can be ordered under Rule 80.

Appeal allowed. Costs of appeal and of motion below in the cause to the defendant.

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(a) Now reported, ante p. 561.

## ROBERTSON V. COWAN ET AL.

*Security for costs.*

A defendant is entitled to security for costs from a plaintiff whose permanent residence is foreign, if at the time application is made the plaintiff is actually out of the jurisdiction.

[February 6, 1885.—*The Master-in-Chambers.*]

THE plaintiff, a young lady just arrived at majority, sued defendants as trustees of the estate of her deceased father. At the time of his death the plaintiff, then of the age of five years, was taken by her mother to the Fiji Islands, where she had continuously resided until just before the bringing of this action. The mother had married a planter in the Fiji Islands, and her home was with him on one of those islands. In her examination before trial the plaintiff stated that she had come to Ontario simply to recover whatever might be coming to her from her father's estate. Whether she would remain after the conclusion of the suit "depended," she said, "upon circumstances." The plaintiff had no property in Ontario other than what might be found due to her in this action, which the defendants alleged would be very little if anything. At the trial a reference was directed to take an account of the defendant's dealings with the estate. The plaintiff's mother, who had come over with the plaintiff, gave evidence upon the reference, and then returned to her home in the Fiji Islands. The plaintiff, it was alleged upon information and belief, had gone with her; but her solicitor swore that he understood that the plaintiff had merely gone to spend the winter with an uncle in Michigan, in order to undergo medical treatment at his hands, he being a doctor of medicine. The plaintiff made no affidavit.

*Clement*, for the defendants, moved for security for costs, citing *Sutherland v. McDonald*, 9 P. R. 178; *Redondo v. Chaytor et al.*, 4 Q. B. D. 453, and cases there collected; and urged that, although as long as the plaintiff remained within the jurisdiction security could not be demanded of



her, nevertheless the moment she left the jurisdiction the defendant became entitled to ask it. No presumption in favour of an intended return could be drawn in the case of the plaintiff, whose permanent residence was out of the jurisdiction.

*Masten*, shewed cause.

THE MASTER made the order as asked.

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### INGRAM V. INGRAM (a).

*Alimony suit—Plaintiff's disbursements—Counsel fee.*

An order was made in an alimony suit for payment to the plaintiff, before the trial, of \$22.35, on account of her disbursements for witness fees, and of \$40 on account of counsel fee.

*Quære*, whether the counsel fee should be paid in advance if the plaintiff's solicitor acts as counsel.

[December 20, 1883.—*Ferguson, J.*]

AN appeal by the defendant from the order of the Master-in-Chambers of the 1st December, 1883, directing the defendant in an alimony suit to pay to the plaintiff before the trial "on account of her *interim* disbursements for witness fees \$22.35, and on account of her disbursements for counsel \$40."

*Denovan*, for the appeal, cited Chy. G. O. 491 : *Haffey v. Haffey*, 7 P. R. 137.

*Millar*, contra, supported the order of the Master.

FERGUSON, J.—The order appealed from says that the \$40 is given for a counsel fee, and I am to say whether or not this should have been done. See *Bishop on Marriage and Divorce*, vol. ii. p. 394. After consultation with Mr. Justice Proudfoot in regard to the principle of his decision in *Haffey v. Haffey*, 7 P. R. 137, I am of opinion that the

(a) See *Magurn v. Magurn*, post 570.



appeal must be dismissed, with costs. The order appealed from might be fuller in regard to the fee not being payable to the solicitor for the plaintiff or his partner as counsel, but I cannot reverse it.

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### MAGURN V. MAGURN.

*Alimony suit—Counsel fee.*

An order was made in an alimony suit, directing the defendant to pay to the plaintiff, before the hearing of an appeal, a sum of \$40, for the purpose of paying the wife's counsel fee, notwithstanding that the solicitor for the plaintiff would be her counsel on the appeal.

*Quere*, whether owing to the altered status of married women, the reason for such payment has not ceased.

[December 21, 1883.—*Osler, J. A.*]

THIS was an alimony suit brought in the Chancery Division, where a judgment was pronounced in favour of the plaintiff. The defendant appealed to the Court of Appeal, and the plaintiff now applied to a Judge of that Court in Chambers for an order for payment by the defendant to the plaintiff before the hearing of the appeal of a sum for the purpose of paying the wife's counsel fee.

*Langton*, for the plaintiff.

*Millar*, for the defendant, contended that where the plaintiff's solicitors were to act as counsel the order asked for should not be made.

OSLER, J. A.—It seems clear that where the counsel fee is, or must be an actual disbursement by the wife's solicitor, the husband will be ordered to provide it.

I have not found nor have I been referred to any decisive authority that this will not also be done where the solicitor or his partner is or may be counsel as well. That seems to me to be merely an accident of the cause. I take it the solicitor has a right, if he is retained as counsel, to insist on payment of his fee in the usual way. He is not

bound to give credit for it, and it becomes a disbursement of the wife in one case as well as in the other.

I have spoken to some of my learned brethren, Justices of the Chancery Division, who do not dissent from this view.

I shall act upon it in the present case as only carrying out the practice as I find it. But if it becomes my duty to reconsider the practice of ordering the husband to pay his wife's disbursements in suits of this nature, I should be strongly disposed to think that owing to the altered status of the married woman, the reason for it has ceased to exist. The order will be that the husband pay a sum of \$40 for the purpose of paying the wife's counsel fee.

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BRADLEY V. BRADLEY.

*Alimony suit—Order on defendant to pay plaintiff's witness and counsel fees.*

[March 4, 1885.—*The Master-in-Chambers.*]

A motion by the plaintiff in an alimony suit for an order directing the defendant to pay plaintiff's witness and counsel fees in advance to enable her to bring the action to trial, and also to pay plaintiff's *interim* cash disbursements.

*Millar*, for the motion.

*Shepley*, contra, cited *Haffey v. Haffey*, 7 P. R. 137.

THE MASTER-IN-CHAMBERS followed the cases of *Ingram v. Ingram*, and *Magurn v. Magurn*, (a) and ordered the defendant to pay plaintiff's witness fees, counsel fee, and disbursements of suit forthwith, the solicitor for the plaintiff to see to the proper expenditure of counsel and witness fees.

(a) Now reported *ante*, pp. 569, 570.

## LOCOMOTIVE ENGINE COMPANY V. COPELAND ET AL.

*Substitutional service—Local Judge—Rule 422, O. J. A.*

Two of the defendants lived in Chicago, Ill., and had no solicitor in the county where the action was begun.

*Held*, that the local Judge of the county in which the action was begun had no jurisdiction under Rule 422, O. J. A., to make an order for substitutional service of process on these defendants.

[March 23, 1885.—*Rose, J.*]

THIS was appeal from the order of the local Judge of the High Court at Kingston allowing substitutional service of the writ of summons in this action on two defendants who had absconded, and were then resident in Chicago.

The ground of appeal was, that the local Judge had no jurisdiction to make the order.

The action was begun in the High Court of Justice by a writ issued out of the local office at Kingston.

*Pattison*, for the appeal.

*D. W. Saunders*, contra.

ROSE, J.—Rule 422 O. J. A., which states the matters in respect to which jurisdiction exists, expressly excepts “granting leave for service out of Ontario, or to allowing service out of Ontario of a writ of summons or of notice of a writ of summons.”

An order allowing substitutional service is in one sense serving the defendant in Ontario by leaving the writ with the person named in the order or observing the other directions thereof; but in another sense it is serving the defendant out of Ontario by serving some one living in Ontario.

— However that may be, sub-section (a) of the rule declares that such power as is conferred by the rule on County Judges “shall not apply to any action in which the writ is issued in the county of York, or (except by consent) to any action wherein the solicitors for all parties do not reside or have not offices in the county town of the county

in which the action is brought, or *wherein any party who has no solicitor does not reside in, or has not a place of business in the county or union of counties.*" As these defendants had no solicitors the words which I have italicised seem to show that a local Judge of the High Court has no power to make such an order as the one appealed from.

Reference was made on the argument to *Clark v. Auger*, 3 C. L. T., p. 217, as a declaration by the learned Judges of the Chancery Division of their views as to the construction of this clause.

I have conferred with the learned Judges. They have no present recollection of the case or of having considered the question, and while not throwing any doubt upon the correctness of the report they call attention to the fact that no argument upon the point was had before them.

Had I entertained a different view I should have followed that case as such an expression of opinion as I could not disregard. I, however, have arrived at the same conclusion for the reasons above stated. The order must be set aside. The motion came on in the first place to *rescind* the order now moved against, and failed, as I held, following my judgment in *Ryan v. Canada Southern Railway Co. (a)*, that sitting in Chambers I had no jurisdiction to rescind the order of a local Judge of the High Court made in Chambers, and so refused the order I gave permission to move by way of appeal, and enlarged the time for such purpose. The defendants moving have thus failed in one motion and succeeded in the other. There will, therefore, be no costs of either motion to either defendants or plaintiffs.

(a) Now reported *ante* p. 535.

## MASSE V. MASSE (a).

*Action in Chancery Division—Jury notice—Transferring action..*

Since Rule 545, O. J. A., an action is not to be transferred from one Division of the High Court of Justice to another, except on very strong grounds.

In an action for the recovery of land, in which the writ issued from the Chancery Division, the jury notice served by the defendants was struck out, and a motion to transfer the action to another Division was refused.

*Bank of British North America v. Eddy*, 9 P. R. 468, does not since Rule 545 O. J. A. afford any general rule of practice.

[April 20, 1885.—*Boyd, C.*]

THIS was an action for the recovery of land. The writ of summons was issued compulsorily in the Chancery Division, pursuant to Rule 545, O. J. A. The defendant served a jury notice, which the plaintiff moved before the local Master at Ottawa to set aside, on the ground that the action being in the Chancery Division a jury notice was improper, and that the action could be more conveniently tried by a Judge without a jury. The local Master enlarged this motion before a Judge, and it was heard by Boyd, C., along with a motion by the defendant to transfer the action to one of the other divisions.

*J. C. Hamilton*, for the plaintiff.

*W. H. P. Clement*, for the defendant.

BOYD, C.—The object of Rule 545 being to equalize the business in all divisions of the High Court, an action will not now be transferred from one division to another except on very strong grounds. I cannot say, on the facts disclosed, that this action would be better tried by a jury than by a Judge alone. The decision in *Bank of B. N. A. v. Eddy*, 9 P. R. 468, does not now afford any general rule of practice since the passing of Rule 545.

Order made striking out the jury notice, and dismissing the motion to transfer the action.

(a) In *Pawson v. Merchants Bank*, decided in the Court of Appeal on the 12th May, 1883, it has been held that Rule 545 makes no difference in the rights of the parties to a trial by jury.



## CULVERWELL V. BIRNEY.

*Examination—Presence of parties—Special examiner.*

A special examiner has authority to exclude one defendant from his office during the examination of the co-defendant, at the request of the plaintiff.

[March 16, 1885.—*Rose, J.*]

AN appeal from an order of the Master in Chambers, directing the defendant J. L. Birney to attend and be examined at his own expense, and for the defendants to pay the costs.

The defendants attended at the office of Mr. Bruce, Special Examiner, for examination. Counsel for plaintiff and defendants were present.

*J. K. Kerr*, Q. C., for plaintiff, obtained from the examiner an enlargement of the appointment to examine the defendant Joseph Birney until a later hour, and then requested him to retire until his co-defendant was examined. His counsel, who acted for both defendants, objected on the ground that he desired him to be present to assist him. The examiner ruled that Joseph Birney should leave the room, and so informed him, and requested him to leave. He, acting under his counsel's advice, declined. Mr. Kerr then declined to proceed with the examination with him present.

The MASTER-IN-CHAMBERS thought that the defendant Joseph Birney should have left the room when so requested, and made the order appealed from.

*Fullerton*, for the appeal.

*Holman*, contra.

ROSE, J.—The cases of *Sivewright v. Sivewright*, 8 P. R. 81, and *Sadlier v. Smith*, 14 C. L. J. N. S. 30, establish the right of the examiner to exclude from the room parties whose presence is not required.

Mr. Fullerton argued that, as by the 156th section of the Common Law Procedure Act it is provided that "When one of several plaintiffs or defendants has been examined, any other plaintiff or defendant united in interest may be examined in his own behalf or on behalf of those united with him in interest to the same extent as the party examined," and by sub-sec. 2, that "such explanatory examination shall be proceeded with immediately after the examination in chief, and not at any future period, except by leave of the Court or a Judge," he was entitled to have his client Joseph Birney present to hear the examination of his co-defendant J. L. Birney, so as to be able to examine him in explanation if need be.

I see no reason for interpreting the statute in such a manner as to destroy its effect.

It seems to me the convenient mode of procedure was as follows: When the examination of J. L. Birney was concluded (Joseph Birney having retired during such examination) the explanatory examination of J. L. Birney should have been immediately proceeded with. Then the examination of Joseph Birney should follow, and his explanatory examination follow his own examination, and thereupon, if he desired it, the examiner should read over the examination of J. L. Birney, and he could be further examined by his counsel by way of explanation. Unless for some special reason, not existing in most cases, J. L. Birney could remain in the room and hear Joseph Birney's examination, and if he so desired could be examined in explanation of anything Joseph had said. As a matter of fact, there will be but few cases in which one of the parties to a suit will desire to so strictly watch the evidence of a co-defendant or co-plaintiff. Indeed, I think the most careful counsel who attend upon such examinations find very little need for examining their own clients at length by way of explanation. Such examination generally indicates to the opposing counsel the line of defence or attack, and serves but little purpose.

In many cases, if the parties united in interest be

allowed to remain in the room while the others are being examined prior to their own examination, the advantage of such examination will be most materially lessened.

I think the order of the learned Master quite right.

Objection was made to the order directing the costs to be paid by both defendants. I see no objection to this. They had the same counsel, and acted in the same interest. If Joseph was acting contrary to the wishes of his co-defendant, he can settle the question of the costs with him. They both join in the appeal, and in dismissing the appeal I do so with costs against both. The amount of costs was fixed by the Master at \$15. This was also objected to as excessive. As counsel lost the time set apart for the examination and had to attend on the motion, I do not think the Master has erred in the amount fixed by him.

*Appeal dismissed, with costs in the cause  
to the plaintiff in any event.*

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## COOK ET AL. V. LEMIEUX.

*Action for recovery of land—Judgment—Rule 322 O. J. A.*

In an action for the recovery of land the plaintiffs moved under Rule 322 O. J. A., for final judgment upon the pleadings, the depositions of the defendant, taken on his examination for discovery, and upon an affidavit verifying a lease of the land in question to the father and brother of the defendant.

*Held*, affirming the decision of the Master-in-Chambers, that much care must be taken in such cases not to take away the right of trial on *vivâ voce* evidence; and that as the plaintiff's case was not conclusively made out, the motion was properly refused.

*Quære*, whether the lease in question was a document that under Rule 322 O. J. A., could be proved on this motion by an adverse affidavit without cross examination.

[March 30, 1885.—*The Master-in-Chambers.*]

[April 13, 1885.—*Rose, J.*]

AN action for the recovery of land, brought by the executors of James W. Cook against Joseph Lemieux.

The statement of claim set out that the plaintiffs leased the land in question to Josué Lemieux and Harindone Lemieux (the father and brother of the defendant) on the 2nd day of June, 1876, and that the lessees thereafter held possession as tenants; that the tenancy had been terminated, but that the lands had never been delivered up to the plaintiffs, but that the tenants had at the solicitation of, and in collusion with the defendant, delivered up possession to the defendant with the fraudulent purpose and intent of enabling the defendant to obtain and hold possession thereof adversely to the plaintiffs, and that the defendant had ever since held possession of the lands so obtained; that the defendant, before the time of obtaining possession, had purchased some pretended claim of title adverse to the plaintiffs' title, and obtained possession for the purpose of asserting his pretended title adversely to the plaintiffs.

The defendant, in his statement of defence denied the allegations of the statement of claim, and pleaded that James W. Cook was not at the time of his decease the owner of the land, and also set up the statute of limitations.

The defendant on his examination in the action before the local Master at Ottawa, admitted that he was the son of Josué Lemieux and the brother of Harindone Lemieux; that he had gone into possession under his father, and that his father had told him that he had obtained a lease from the Cooks. In answer to the question, "What title do you set up?" the defendant said, "My father simply claims possession for so many years, paid taxes, &c.' Q. When your father spoke about holding possession against the Cooks, notwithstanding the existence of this lease, I understand that the only ground by reason of which he expected to hold that possession was the length of time, Is that the case? A. Yes.

The plaintiff made a motion before the Master-in-Chambers for an order for final judgment under Rule 322, O. J. A., producing the pleadings, the examination of the



defendant, and the lease to Josué and Harindone Lemieux verified by affidavit.

*A. H. Marsh*, for the motion, cited *Doe dem. Graves v. Wells*, 10 A. & E. 427; *Doe dem. Ellerbrock v. Flynn*, 1 C. M. & R. 137; *Vivian v. Moat*, 16 Ch. D. 730.

*Watson*, contra, cited *Trust and Loan Co. v. Hill*, 9 P. R. 8, and *Henebery v. Turner*, 2 O. R. 284.

The facts further appear in the judgment of the Master.

THE MASTER-IN-CHAMBERS—From the best consideration that I can give to this case, I think the plaintiffs have difficulties in their way in seeking judgment under Rule 322, The plaintiffs are bound to make out that beyond doubt they are entitled to possession. They find it necessary to prove by an adverse affidavit the lease to the father and brother of the defendant. But the defendant in his defence has denied that lease, with every thing else that the plaintiffs have averred in their statement of claim. It is true that the defendant on his examination, admits that his father told him there was a lease from the plaintiffs, but he does not admit any of the terms of it—the date—the term granted—the rent, if any, nor does he speak as of his own knowledge. None of these things, nor any particulars respecting it, are disclosed, except the fact that it was a lease of the land in question. Is this a document that under the rule can be proved on this motion by an adverse affidavit without the necessity of any cross-examination? Supposing it to be so, the lease put in is to the father and brother of the defendant (the brother having left this country six years ago), and is a lease from year to year, terminable at the end of any year on six months' notice—the lessees to pay all taxes and keep the fences in repair. The defendant was put into possession, not with any interest in the place but simply as the agent of and for his father. It is therefore necessary for the plaintiffs to show that the interest of the lessees under the lease is at an end. This they seek to do, not by showing a notice to quit, but by seeking to show that the father has disclaimed the title under the plaintiffs, and here I think their case is not perfect. The



examination of the defendant does show that the father put the son into possession to hold the land as his, the father's, agent, and from the conversation with the defendant it would seem that the father supposed he had by possession (or could procure) a title under the Statute of Limitations, and therefore wished the defendant to hold the land, and further, what the father said to the son shews that he had the wish to obtain an outstanding title against the plaintiffs, which the father supposed to exist in Mr. Greenshields, and the son, by the desire of the father, saw Greenshields on the subject. But nothing ever came of this. The father never took, nor assumed to take any title from Greenshields. And nothing of this was ever communicated to the plaintiffs, for all that appears. The possession of the son was just the possession of the father—and all these things were said by the father to the son. They have not resulted in any act contrary to the plaintiffs' title as landlords. And it does not appear that anything undertaken by the lessees has not been performed up to this time. It is as though the father, the lessee, had continued in possession, having in his mind the intention to set up the Statute of Limitations against the plaintiffs, without any communication of that fact to them, the father all the time performing everything on his part under the lease. I cannot say that it is plain that there has been a disclaimer by the father.

I do not see that the fact that the son, the defendant, denies the plaintiffs' title in this action can be made use of on this motion. The father, the lessee, might have been made a defendant in this suit, as is plain from the defendant's evidence.

The plaintiffs' case is not conclusively made out, and so I must dismiss this motion.

From this decision the plaintiff appealed to a Judge in Chambers, and the appeal was argued by the same counsel.

ROSE, J.—The appellant failed to convince the learned Master that he was entitled to succeed on the evidence

placed before him. In a carefully prepared judgment the reasons for refusing the order are given.

On the argument I could not clearly conclude that there was no defence which should be tried.

The elaborate argument of Mr. Marsh was some evidence that the case was open to argument, and that there were questions in dispute which remain for decision.

I have carefully considered the judgment of the learned Master, and the case of *Henebery v. Turner*, 2 O. R., 284, and am of the opinion that the judgment appealed from must stand.

If I were in doubt, I should lean towards supporting the decision, for much care must be exercised not to take away the right of trial on *viva voce* evidence where the practice and procedure do not fully warrant such a course.

The appeal must be dismissed with costs to the defendant in any event of the cause.

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### HAMILTON ROAD CO. V. FLATT.

#### *Striking out part of defence—Powers of Registrar.*

The Registrar of a Divisional Court has power to receive evidence by affidavit to shew that an order of Court has not been obeyed, and to enforce the order by striking out paragraphs of the defence.

[March 25, 1885.—*The Master-in-Chambers.*]

AN order was made by the Master-in-Chambers that certain paragraphs of the statement of defence should be struck out unless the defendant should, on or before a certain day in the order named, deliver particulars thereof. Default being made in delivery of particulars, the plaintiffs applied to the Registrar of the Common Pleas

Division on affidavit showing default, whereupon the Registrar struck out the paragraphs referred to in the order.

*Clement*, moved on notice to reinstate the paragraphs of the defence, upon the ground that the Registrar of the Common Pleas Division could not, under the circumstances, strike out the paragraphs of the defence without an order absolute being obtained. It was contended that the Registrar could not receive evidence on affidavit shewing default, as he was only a ministerial, not a judicial, officer.

*Holman*, contra.

THE MASTER-IN-CHAMBERS, after having reserved judgment, held that the Registrar of the Common Pleas Division had acted properly in striking out the paragraphs of the defence, but allowed them to be reinstated upon a satisfactory explanation being given of the delay in delivering the particulars, with costs in any event to the plaintiffs.

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### NORTH V. FISHER.

*Security for costs—Præcipe Order—Rule 431, O.J.A.*

The defendant having obtained on præcipe an order for security for costs, a local Judge allowed the plaintiff to pay \$200 into Court in lieu of giving a bond for \$400, and afterwards ordered a further payment of \$50, but refused to increase the latter sum. An appeal from the order of the local Judge was dismissed, as \$250 appeared to be sufficient.

*Quære*—Whether there is any power to fix the amount at less than \$400, where a præcipe order under Rule 431, O. J. A. has been taken out.

[April 13, 1885—*Rose*, J.]

THE plaintiff lived out of the jurisdiction, and the defendant issued a *præcipe* order calling on the plaintiff to furnish security for the defendant's costs of the action. Afterwards the plaintiff obtained from the local Judge at

Hamilton an order permitting him to pay \$200 into Court as security in lieu of giving a bond with sureties in the sum of \$400, the amount fixed by Rule 431, O. J. A. This order reserved leave to the defendant to move for additional security. A further order of the local Judge directed the plaintiff to pay an additional \$50 into Court. A motion was subsequently made by the defendant for an order for further security, which the local Judge refused, and from the order refusing such motion the defendant now appealed to a Judge in Chambers. The defendants solicitor put in bills to shew what costs had been incurred in the action.

The facts appear in the judgment.

*F. Fitzgerald*, for appeal.

*Holman*, contra.

ROSE, J.—I have carefully considered the judgment of the learned local Judge and the reasons therefor. I agree in the conclusion at which he has arrived.

With the kind assistance of Mr. Clark, one of the experienced taxing officers of the Court, I have examined the items of the bill of costs, shewing charges for work said to have been done up to the 27th of February last. The bill, as presented to us, amounts to \$308.90. Apparently about \$120 could not be taxed as against the plaintiff. This would leave about \$185 taxable, if the work can be proven to be done. The security is now \$250 paid into Court, leaving about \$65 to answer future costs. This will not be sufficient if there is to be evidence taken on commission, and probably not sufficient if the case goes to trial without such evidence. However, as pointed out by the learned Judge, this application is made, notwithstanding that no work has been done since the order in Chambers directing payment into Court of the sum of \$50 as additional to the \$200. The date of that order was the 10th of February last.

If it becomes necessary to apply for an order for a commission to take evidence for either the plaintiff or defend-

ant, or if the plaintiff gives notice of trial, the learned Judge intimates in his judgment that he may find it proper to require further security to be given. It appears from the papers in this case that a *præcipe* order for security for costs was taken out, and that by order of the learned local Judge the plaintiff was permitted to pay \$200 into Court in lieu of giving a bond with sureties in the sum of \$400. The order reserved leave to the defendant to move for additional security.

I asked for the authority for making an order enabling a plaintiff to pay into Court a less sum than the \$400 where the defendant has taken out a *præcipe* order. Mr. *Holman* could cite none unless it was given by Rule 429. Rule 431 provides that "where it appears by the writ of summons \* \* that the plaintiff resides out of Ontario the defendant *shall be entitled on præcipe to an order requiring the plaintiff within four weeks from the service of the order to give security in \$400 for the defendant's costs of the action \* \* .*" It will be observed that no mention is made of a bond, nor is the form of giving security specified.

In *Cliffe v. Wilkinson*, 4 Sim. 123, the Court permitted £100 to be paid into Court in lieu of giving a bond, but required £20 to be added to cover costs of paying in and taking out. See also *Ganson v. Finch*, 3 Ch. Chamb. 296; *Re Howland*, 4 Ch. Chamb. 6; *Luther v. Ward*, 2 Ch. Chamb. 175, collected in *MacLennan's Jud. Act*, 2nd ed., p. 536; *Taylor's Consolidated Chancery orders* pp. 290-3, as to the practice in the Court of Chancery. So far as I can see, by the practice of that Court, \$400 were required to be paid into Court.

Where the Rule of Court fixes the sum at \$400 it requires clear authority to warrant an order reducing such sum. Rule 429 provides that "In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such time or times and in such manner and form as the Court or a Judge shall direct." This rule would apparently apply where it was



necessary for the defendant to apply for an order to the Court or Judge, but perhaps not where the defendant, being entitled to such an order on *præcipe*, the plaintiff applies for leave to pay money into Court in lieu of giving a bond. By Rule 431 the amount, the time, and other terms of the order are fixed. As the order permitting the plaintiff to pay \$200 into Court is not in review before me, the defendant having accepted the terms, it does not become necessary to express an opinion. It seems to me that, where a defendant obtains a *præcipe* order, it will be safe not to permit a plaintiff to pay into Court less than \$400, unless upon argument the right to do so can be made sufficiently clear to render the practice safe. I shall be glad to fully consider the question when it arises directly for decision but content myself now with calling attention to the doubt.

The appeal fails, and must be dismissed, with costs in the cause to the plaintiff in any event.

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### GRANT V. MIDDLETON.

#### *Notice of trial—Divisions of High Court.*

A notice of trial in an action brought in the Queen's Bench or Common Pleas Division given for a special sitting for the trial of actions in the Chancery Division is irregular, and will be set aside.

[April 18, 1885.—*The Master-in-Chambers.*]

AN action in the Common Pleas Division.

Notice of trial was served by the plaintiff for the Spring Sittings for the trial of actions in the Chancery Division at Toronto.

*Holman*, for the defendant, moved to set aside the notice of trial as irregular.

*A. H. Meyers*, for the plaintiff, contra.

THE MASTER-IN-CHAMBERS, made an order setting aside the notice of trial as irregular.

## MACDONALD V. PIPER.

*Costs—Action by solicitor against client—Reference to taxation—Rule 443  
O. J. A.*

*Held* that by the Ontario Judicature Act, the former practice has been changed, and an order referring a bill of costs to a taxing officer, should not direct the officer to do more than ascertain the proper amount of it.

[April 21, 1885.—*The Master-in-Chambers.*]

AN action upon a solicitor's bill of costs.

The plaintiff moved, under Rule 80, O. J. A., for leave to sign final judgment, or for an order referring all questions in the action to one of the taxing officers.

The facts appear in the judgment.

*George Bell*, for the motion.

*Moffatt*, contra.

THE MASTER-IN-CHAMBERS.—The plaintiff first sued the defendant in the Division Court. The learned Judge (Mr. McDougall), after hearing the evidence nonsuited the plaintiff.

Now the plaintiff has sued by this action in the High Court, by a specially endorsed writ, and the defendant having appeared, I am asked to make an order for final judgment in the action, on the plaintiff's affidavit of the debt from defendant, and to refer it to the taxing officer, with full powers to settle all the questions in the cause, and to tax the amount of the plaintiff's claim, should plaintiff otherwise succeed.

The defendant by two affidavits has on this motion denied all liability to the plaintiff, or that he ever retained him to do the work the plaintiff charges for.

This is an application in a pending action, and is a novel one to me. If it were an application under Rule 80, it would be fully answered by the affidavit on the part of the defendant.

There can be no objection to referring the bill to the taxing officer to have ascertained the proper amount of it.

But that is not what is sought at all. It is sought to refer to the taxing officer the question of the defendant's liability to the plaintiff. Several cases have been cited. *Re Bacon*, 3 Ch. Chamb. 79 is one of them, showing that the Court will refer, as I take it, all questions between the parties on the taxation of a solicitor and client bill, to the taxing officer.

Has our Judicature Act made a difference in this respect? It seems to me that it has. In *Re Clarke*, 9 P. R. 197, I set aside an order for taxation regular according to the practice before the Judicature Act, which ordered the client to pay within 20 days the amount as found by the taxing officer.

There was no appeal in that case, but I know it was afterwards brought into discussion in a case which was strenuously argued before Mr. Vice-Chancellor Ferguson, who, I have been informed, approved of the decision in *Re Clarke*.

It should be observed that our Rule 443, and the form of order for taxation under it, (form 136) given in the appendix, are peculiar to our practice. There is no such Rule in the English Practice. I expressed at length in *Re Clarke* what I then had to say on the subject, and I beg to refer to that case, as I believe it to have been affirmed as I have said. I also refer to *Re A. B. & C. D.*, 8 P. R. 126-7, a decision of Mr. Justice Osler in 1879.

This case, however, arises in an action. The questions in an action are *prima facie* triable in a different way, and though I would of course refer the bill to simple taxation, yet I do not think it proper to refer the question of liability in the action, as proposed.

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## MERCHANTS BANK V. MONTEITH.

## EX PARTE STANDARD LIFE ASSURANCE COMPANY.

*Insurance for wife and children—40 Vic. ch. 20 (O).—Administrator not trustee of such moneys—Jurisdiction of Master—Payment into Court.*

A testator insured his life for the benefit of his wife and children. The policy provided that the money should be payable as might be directed by will. The testator by will appointed executors, and gave his wife the income of his estate for life and after her death the corpus to his son. The executors renounced probate, and after revocation of a prior grant to the son, who was then a minor administration was granted to the defendant P. The policy provided that the money might be payable to the executors or administrators. The Act 47 Vic. ch. 20, (O) provides that such policy moneys to which infants are entitled shall be payable to a "trustee, executor, or guardian." P. claimed the moneys as administrator, whereupon the Insurance Company under sec. 15 of the Act, and G. O. 197, and rule 541 (a) O. J. A., applied to the Master-in-Ordinary in Chambers for leave to pay the moneys into Court. The Master held (1) that voluntary applications to pay in money may be made in Chambers. (2) That under rule 541 (a) O. J. A., he had jurisdiction, by virtue of the administration proceedings before him, to make the order. (3) That by the renunciation of the executors there was no "trustee, executor, or guardian competent to receive the share of the infant." (4) That the Act excluded the administrator from any claim to the fund, and his receipt would not be within the protection of the Statute. (5) That the administrator was not a trustee by the will, except as holding surplus assets, after administration with notice of a trust. (6) That the money was no part of the estate subject to the control of creditors, and when paid in should be "ear marked," and not mixed with the other funds of the estate. On appeal by the administrator, P., Proudfoot, J., made an order directing that the money in Court be paid out to the Insurance Company.

[September 26, 1884.—*The Master-in-Ordinary.*  
[October 6, 1884.—*Proudfoot, J.*]

IN this case the usual order had been made in Chambers for the administration of the estate of the testator, William Monteith. In taking the accounts a question was raised as to whether a policy of insurance created by the testator in the Standard Life Assurance Company, for the benefit of his wife and children, was part of the assets of the estate, and liable to the claims of creditors. It was stated that the administrator had commenced an action against the company for the amount of the policy, but that the company was desirous of paying the money into Court. The company obtained leave from the Master-in-Ordinary in Chambers to move for an order to pay in the money under 47 Vic. ch. 20, sec. 15, O. and G. O. Chy. 197.



The application was supported by an affidavit of the solicitor of the company, stating that an action had been commenced against the company by the administrator and the widow, and that the money had also been claimed by the receiver in this matter on behalf of the creditors of the testator. The policy provided that the money was to be payable for the benefit of the widow and children of the testator in such manner as he should by will appoint. By his will the testator gave to his wife the income of his estate for her life, and on her death the whole estate was to go to his son, the infant defendant. All the parties interested, except the company, were before the Master on the reference.

The other facts of the case are stated in the judgment.

*Rae*, for the Insurance Company, moved for the order, and also appeared for the plaintiffs.

*Black*, for the infant defendant, joined in the motion.

*J. A. Paterson*, for the unsecured creditors, contended that these insurance moneys were part of the estate and should be paid into Court.

*J. Macgregor*, for the administrator and widow, contended that under sec. 5 of 47 Vic. ch. 20, the order could not be made, as it distinctly provided that insurance moneys secured for the benefit of wives and children should form no part of the deceased, estate; and that the Master had no jurisdiction, as this formed no part of the estate of the late William Monteith.

MR. HODGINS, Q.C., MASTER-IN-ORDINARY.—The right of the insurance company to make this application depends upon the following section of 47 Vic. ch. 20 :

“15. If there is no trustee, executor, or guardian competent to receive the share of any infant in the insurance money, and the insurance company admit the claim or any part thereof, the company at any time after the expiration of two months from the date of their admission of the claim or part thereof, may obtain an order from the High



Court of Justice for the payment of the share of the infant into Court ; and in such case the costs of the application shall be paid out of the share (unless the Court otherwise directs) and the residue shall be paid into Court pursuant to the order ; and such payment shall be a sufficient discharge to the company for the money paid ; and the money shall be dealt with as the Court may direct."

By sec. 11 the insured is authorized to appoint by the policy, or by his will, a trustee or trustees of the money payable under the policy.

By sec. 12, if there be no trustee appointed, the moneys may be paid to "the executors of the last will and testament of the insured" (not the administrator), or to a guardian or trustee appointed by one of the Courts.

By sec. 5 the policy moneys are not to be subject to the control of the creditors of the assured, nor to form part of his estate.

The policy gives the insured a power of appointment over these insurance moneys which he may exercise by will. By the terms of this testator's will, the income or interest is payable to the widow for her life, and on her death the principal is to go to the infant defendant.

The testator did not name a trustee, but he appointed executors ; and had they not renounced, they would have been the proper parties to receive these moneys from the company. By their renunciation of probate, sec. 15 of the Act becomes operative, and is invoked as the authority for the application now made.

On the evidence before me I find that there is "no trustee, executor, or guardian, competent to receive the share of the infant in the insurance money," and competent to discharge the company according to the terms of the statute.

The administrator contends that he is entitled to get in this money. I think not, for the reasons, (1) that the Act does not recognize his right as administrator in any way, but in effect excludes it ; and (2) that he could only receive it as part of the estate of the testator, which the Act declares it shall not be. Though the policy pro-

vides that the money may be payable to the executors or administrators of the insured, the statute passed since the contract of insurance must be construed as controlling the contract; and by designating a trustee, executor, or guardian as the party whose receipt "shall be a good discharge to the insurance company" and by authorizing payment into Court in case none of such parties is "competent to receive the share of the infant in the insurance moneys," it has, I think, excluded the administrator from any claim or right to the fund. His receipt is not recognized; and a payment to him by the company would not, I think, be within the protection of the statute.

An administrator is not properly a trustee under a will in any sense upon the renunciation of an executor-trustee, except as holding the surplus assets, after the administration, with notice of a trust: *Lewin on Trusts*, 6th ed., p. 182. Besides, this defendant holds the office of administrator *durante minore ætate* of an infant whose appointment as administrator was void: *Merchants Bank v. Monteith*, 10 P. R. 334. According to *Fotherby v. Pate*, 3 Atk. 604, such an administrator cannot sue, nor can he be called to account for anything he may do, but by the executor. But in *Cope v. Cope*, 16 Ch. D. 49, it was held that he has, for the time being, all the powers of an ordinary administrator. See also *Dowdeswell v. Dowdeswell*, 9 Ch. D. 294.

The Imperial Act 45 & 46 Vic. ch. 75, sec. 11, is different from our Act, for it recognizes and gives validity to the receipt of a trustee, or of a "legal personal representative of the insured."

The statute authorizing the company to apply for an order to pay in, must be construed as directing the motion to be made to that department of the Court to which voluntary applications to pay in money may be made; and by G. O. 197, sub-sec. 11, jurisdiction is given to Chambers to make orders "for the payment into Court of moneys by parties desiring on their own behalf to pay in the same."

This is analogous to the English practice, which allows a purchaser under a decree of the Court (and not a party to the cause, as this company is not a party to this matter), to apply in Chambers for leave to pay in his purchase money : *Davenport v. Davenport*, 9 Ha. App. l., S. C., 16 Jur. 988, 22 L. J. Ch. 11. But the English practice differs from ours in that it excludes the jurisdiction of Chambers, if the voluntary application to pay in the money is opposed : 1 *Seton on Decrees*, (3rd ed.), 47.

By Rule 541 O. J. A., jurisdiction in Chambers is given to the Master-in-Ordinary, "in respect of all causes and matters referred to him or which may arise in his office." The administration of the testator's estate has been referred to me ; and in dealing with the accounts and legacies the question has arisen whether this insurance money forms part of the estate or not ; at all events the trusts and actual disposition of it are governed by the testator's will which is before me, and by which I am to administer the estate.

For these reasons I think I have jurisdiction to make the order ; and I will provide in the order that this money shall be "ear marked," and not be mixed with the funds of the estate : *Lord Muskerry v. Skeffington*, L. R. 6 H. L. 144. There will be a special finding in my report as to this fund.

As to costs, the company may deduct \$10 for the costs of this application and of payment into Court. Other parties will be entitled to their costs, except the administrator, who is a stranger to the fund.

From this judgment the administrator appealed.

*Rae*, for the company and the plaintiffs.

*Black*, for the infant defendant.

*J. A. Paterson*, for the unsecured creditors.

*Macgregor*, for the administrator and widow, contended that under the authority of *Re Curry*, 8 P. R., no order to pay money into Court could be made in Chambers : that under the Trustees' Relief Act the in-

insurance company could not apply to have the money paid into Court: *Mathews v. Northern Assurance Co.*, 9 Ch. D. 80; *In re Haycock*, 1 Ch. D. 611.

PROUDFOOT, J., made an order directing that the money in Court be paid out to the insurance company.

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CLENDENNAN V. GRANT.

*Judgment—Rule 324, O. J. A.—Covenants—Unascertained amount.*

Leave was given to the plaintiff under rule 324, O. J. A. to sign final judgment, where the claim was upon a covenant by the defendant with the plaintiff to pay certain mortgages made by the plaintiff upon lands sold by him to the defendant, and for indemnity, and where the plaintiff was being sued for payment of four of the mortgages, but had not actually paid them.

It was directed that the judgment to be entered should be for the amount of the four mortgages and interest, (to be computed by the registrar) and costs.

Leave was reserved to the defendant to apply to be relieved from the judgment upon his satisfying the claim of the holder of the mortgages.

[January 27, 1885.—*Rose, J.*]

A motion for judgment under Rule 324, O. J. A.

The facts appear in the judgment.

*J. B. O'Brian*, for the plaintiff.

*A. H. Meyers*, for the defendant.

ROSE, J.—The claim is on a covenant by defendant with plaintiff to pay certain mortgages made by plaintiff on lands sold by him to defendant. The covenant, in addition to the agreement to pay, is one of indemnity. The plaintiff shews that he is sued and that probably judgment has been signed and execution issued thereon, to enforce payment of some of the mortgages, amounting in all to \$2,000—these mortgages being in arrear for both principal and interest. The affidavit does not set out the terms of payment of the mortgage moneys or the interest payable thereon.



The defendant has appeared to the action, and counsel appeared for him on the motion. The facts stated in the affidavits are not denied, no affidavit is filed by the defendant, and I have no doubt he has no defence to the claim by the plaintiff for payment and indemnity.

His counsel contented himself with objecting to the sufficiency of the plaintiff's material, and that he could not recover damages until he had paid the mortgage moneys, citing *Penny v. Foy*, 8 B. & C. 11. Reference to that case will shew that it is no authority for the defendant's contention. It decided that, where the covenant was for indemnity only, the covenantor must prove actual damages, but not so where the covenant was for payment of an annuity.

The following extract from the judgment in *Port v. Jackson*, 17 Johns. (N.Y.) 239, found in *Sedgwick on Damages*, 7th ed., vol. 2, p. 6, states the law very clearly. There the plaintiff, lessee for a term of years, had assigned the term to the defendant, who executed a covenant to pay the rent to the head landlord. It was insisted, on the part of the defendant, that the plaintiff could only recover nominal damages, unless he shewed that he had paid the rent, but the Court said: "The covenant is express and positive that the defendant will pay the rent, and it would be against all reason and justice to say that the plaintiff shall himself pay and advance the money before his right of action against the defendant to recover it arises." And the rent was held to be the measure of damages.

See *Toussaint v. Martinnant*, 2 T. R. 100; *Martin v. Court*, 2 T. R. 640; *Hodgson v. Bell*, 7 T. R. 97; *Atkinson v. Coatsworth*, 8 Mod. 33; *Loosemore v. Radford*, 9 M. & W. 657, where Alderson, B., said, at p. 658: "To what extent has the plaintiff been injured by the defendant's default? Certainly to the amount of the money that the defendant ought to have paid according to his covenant," and he likened it to an action of trover for title deeds. See also *Lethbridge v. Mytton*, 2 B. & Ald. 772. Here there is the express covenant to pay the mortgage moneys from time to



time as the same become due. This is like the covenant in *Loosemore v. Radford*. See, also, *Mayne* on Damages 3rd ed., 7, 281, 347 ; and *Cunningham v. Lyster*, 13 Gr. 575.

I see no reason why the plaintiff should not have judgment against the defendant for the amount of the four overdue mortgages, principal and interest.

It was, however, further objected that, as the affidavit did not set out the times of payment of the mortgage, or the rate of interest, the Court could not direct for what amount judgment should be signed.

I think this difficulty is not a very serious one.

The order will be for judgment for the amount of the four mortgages—principal \$2,000, and interest, according to the terms thereof, with costs of suit and of this application. The amount of interest to be made to appear to the Master by producing the original mortgages, which need not be filed, or if the holder of the mortgages will not part with their possession, then by producing an affidavit setting out copies of the provisions and verifying them.

If the defendant satisfies the holder of the mortgages so that the action against the plaintiff is withdrawn and his costs paid, and so that no further action will be brought against him in respect to these four mortgages, he may apply to be relieved from the judgment in this action

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## RINGROSE V. RINGROSE.

*Costs—Alimony action—R. S. O. c. 40 sec. 48.*

The decision of PROUDFOOT, J., *ante* p. 299 was affirmed on appeal.

[February 18, 1885.—*The Chancery Division.*]

THIS was an appeal from the judgment of Proudfoot, J., reported *ante* p. 299.

The action was one for alimony, and during its pendency and before the trial, the plaintiff returned to live with her husband, the defendant.

The local Judge at Orangeville made an order in Chambers directing the defendant to pay the full costs of the plaintiff's solicitor, which order was, on appeal, reversed by Proudfoot, J., who confined the amount to be paid by the defendant to the cash disbursements of the plaintiff's solicitor.

From this decision the plaintiff's solicitor appealed to the Divisional Court, and the appeal was argued on February 17th, 1885, before Boyd, C., and Ferguson, J.

*W. H. P. Clement*, for the appeal. The summary proceeding by way of motion is correct. That question arose and was argued in *Friedrich v. Friedrich*, 10 P. R. 308. [BOYD, C.—But in that case a judgment was recovered.] When there is a trial and the plaintiff fails, the statute R. S. O. ch. 40, sec. 48, governs; but a case like this is outside of the statute: see *Wells v. Wells*, 1 Swa. & Tris. 308; *Leonard v. Leonard*, 9 P. R. 450; and *Moore v. Moore*, 10 P. R. 284. Before the statute full costs would have been granted, and the question now is, does this case come within the statute. [BOYD, C.—The policy of the law is that the husband shall not be harassed; and if the wife brings her action and fails, she should not get her costs.] Before the statute was passed, even if the plaintiff had failed to obtain a decree, or if there had been a reconciliation before the trial, the defendant would have had to pay all the costs; and I contend the statute does not cover the

latter case, if it does the former. How can a plaintiff be said to have failed to obtain a decree if she never went to trial to obtain it?

*Elgin Myers*, contra. In *Leonard v. Leonard*, 9 P. R. 450, and *Moore v. Moore*, 10 P. R. 284, too narrow a construction was put upon the word "failed." A man may fail to reach a place because he voluntarily stops, or because he is stopped by some one else. The larger and more comprehensive meaning should be given to the word. The plaintiff not having got a decree must be held to have failed to obtain one. In *Cooper v. Cooper*, 3 Swa. & Tris. 392, the wife did not oppose the motion. Even if she got costs *de die in diem* she could only get disbursements, Under sec. 47 she cannot get costs *de die in diem*. The four grounds on which, before the statute she could get her costs were: 1. That they were necessities; 2. That the husband was entitled to the wife's property; 3. That she could, in an Ecclesiastical Court, apply *de die in diem*; and 4. The reasonableness of the proceedings. [BOYD, C.—We have no summary jurisdiction to bring in the parties, and order these costs to be paid. The Act provides for what this Court will do in each action as it arises, and not before. I do not think that that interferes at all with the right of the solicitor to sue for these costs if they are necessities.] I refer also to *Magurn v. Magurn*, 20 C. L. J. N. S. 261 (a); *Stocken v. Pattrick*, 29 L. T. 507; *Ottaway v. Hamilton*, 26 W. R. 783; *Ex p. Moore*, 4 Notes of Cases, Supp. 1; *M. v. C.* L. R. 2 P. & D. 414; *Brown's Law of Divorce*, 4th ed., 351, 352, 359; the cases cited in *Leonard v. Leonard*, 9 P. R. 450, and *English v. English*, 6 Gr. 580. The solicitor who is moving in this matter should pay the costs if the appeal is dismissed.

*Clement*, in reply. The reasonableness of the suit has nothing to do with the case. Before the statute was passed the plaintiff would have got her costs even if her bill was dismissed. The question of necessities does not arise: *McKay v. McKay*, 6 Gr. 279; *Keith v. Keith*, 25 Gr. 110, and the cases there cited.

(a) Now reported, *ante* p. 570.

BOYD, C.—I think I sufficiently expressed my views of this case as the argument proceeded, and since then I have had an opportunity of consulting with my brother Ferguson, and see no reason to change my opinion. The case is fully considered in the judgment of my brother Proudfoot, and I agree in the conclusion therein expressed. In my opinion the appeal should be dismissed, with costs, to be paid by the solicitor, who appealed.

FERGUSON, J.—The statute was, I think, properly construed in *Keith v. Keith*, 25 Gr. 110, by the late Chief Justice, which construction is now adopted by Mr. Justice Proudfoot, and I think that the costs to be allowed should be disbursements only.

*Appeal dismissed. Judgment affirmed, with costs.*

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### WILSON V. IRWIN.

*Judgment—Setting aside—New trial—Rule 270 O. J. A.*

Where judgment for defendant was given at a trial in consequence of the plaintiff's absence, and an application was afterwards made to the Judge at the sittings to reinstate the case, which he refused to entertain, *Held*, that the plaintiff might nevertheless apply under Rule 270 O. J. A., to the Divisional Court at its next sittings to set aside the judgment and for a new trial.

[February 24, 1885.—*The Chancery Division.*]

THIS action was set down for trial at the Toronto Autumn Sittings, 1884, and was placed on the peremptory list on the 2nd December. The defendant appeared on that day, but the plaintiff did not, and the action was dismissed. An application was afterwards made to Ferguson, J., at the same sittings, to reinstate the case, but he refused to entertain it.

*Watson*, for the plaintiff, now moved to set aside the judgment and for a new trial, excusing by affidavits the

non-appearance of the plaintiff at the trial and disclosing a *prima facie* case on the merits.

*Justin*, for defendant, contra. The Court has no jurisdiction. Under Rule 270, O. J. A., the application may be made to the Judge at the trial or to the Court in Toronto. The plaintiff took the first course, and having been unsuccessful in that, he cannot now take the second. His only remedy, therefore, is to appeal to the Court of Appeal from the refusal of the Judge at the trial to reinstate the case. This Court has no power to review the propriety of the refusal: *Re Galerno and Rochester*, 46 Q. B. 379, *McTiernan v. Fraser*, 9 P. R. 246. This case is similar to *Hilliard v. Arthur*, 10 P. R. 281, 426.

BOYD, C.—I do not think the application to Ferguson, J., is any bar to the present motion. That learned Judge gave no decision upon the application. He simply said, in effect, the state of business before him was such that he could not entertain an application to restore the case to be tried before him at that sittings. That left the matter at large, and the plaintiff, under the former practice at law, had certainly the right under such circumstances to apply to the full Court for a new trial, and there is nothing in the practice introduced by the Judicature Act depriving him of that right, and the Court should certainly struggle against a conclusion which would render it necessary for such an application as the present to be carried to the Court of Appeal. *Hilliard v. Arthur*, 10 P. R. 281, 426, appears merely to establish that a Judge in Chambers cannot entertain such applications as this. I think there should be a new trial on the usual terms of payment of costs of the application, and the costs occasioned by the plaintiff having made default.

PROUDFOOT, J., concurred.

*Order for new trial, on payment of costs.*



\*PETRIE V. GUELPH LUMBER COMPANY ET AL.  
 STEWART V. GUELPH LUMBER COMPANY ET AL.  
 INGLIS V. GUELPH LUMBER COMPANY ET AL.

*Costs—Taxation—Appeal—Cases printed and argued together—Defendants severing.*

The defendants were the same in all three actions. The actions were brought against the defendants other than the company as wrongdoers. They were sued for an alleged conspiracy to defraud, which it was alleged they carried into effect by defrauding the plaintiffs respectively. The defendant McLean defended, meeting the charge directly. The other defendants did the same, but they further said that they obtained their information from McLean, and that they believed it to be true, and believed that the statement made by them and McLean, which was the foundation of the actions, was true.

*Held*, that the taxing officer was right in allowing two bills of costs, one to the defendant McLean and one to the other defendants.

When the actions were in the Court of Appeal, Burton, J.A., made an order that only one appeal book should be printed for the three cases, and the three cases were argued together.

*Held*, that the taxing officer was right in allowing separate counsel fees in each case.

*Quære*, whether the appeal should not have been to a Judge of the Court of Appeal, instead of to one of the Chancery Division.

[March 16, 1885.—*Ferguson, J.*]

APPEALS by the plaintiffs from the certificate of J. H. Thom, one of the taxing officers, as to his taxation of the costs of these actions in the Court of Appeal. The case is now in the Supreme Court of Canada.

It was objected by the defendants that the appeals should have been to a Judge of the Court of Appeal.

It appeared, however, that the appeals had been brought before a Judge of the Court of Appeal (Patterson, J. A.) who said that the appeals should be to a Judge of the High Court of Justice, and not to a Judge of the Court of Appeal.

FERGUSON, J.—Under such circumstances, I think I should hear the appeal, though my doing so is objected to.

The grounds of the appeal were: 1. That the taxing officer should not have allowed two bills of costs to the defendants. He allowed one bill to the defendant McLean and one to all the other defendants. 2. That the taxing officer should not have allowed a separate bill of costs in

\*An appeal to the Divisional Court is pending.

each of the three cases in appeal, for by an order of Burton, J. A., in Chambers, only one appeal book was printed for the three cases, and the three cases were argued together.

*Creelman*, for the appeal. There was no special case made against the defendant McLean. The charge was against the directors of the Guelph Lumber Company, and all the directors, the defendant McLean being one of them. Only one set of costs is allowed to defendants, except in special cases: *Morgan* on Costs, Ed. 1882, pp. 124, 125, 126; *Hughes v. Key*, 20 Beav. at p. 397; *Bull v. West London School Board*, 34 L. T. N. S. 674; *De Burgh v. Chichester*, 19 W. R. 221. The taxing officer should not have allowed separate bills of costs in each case, and should not have allowed a separate counsel fee in each case; Rule 29 of the Court of Appeal as to the amount of counsel fees.

*Walter Barwick*, for the defendant McLean. Defendants are justified in severing where there are charges of fraud, although they stand in a fiduciary position: *Smith's Chy. Prac.* pp. 470, 1090; *Chy. G. O.* 315, *Holmested*, p. 174; *Greedy v. Lavender*, 11 Beav. 417. The Judge will not interfere when the taxing officer has exercised a discretion; *MacLennan's Jud. Act*, 2nd Ed. p. 549. The defendant McLean's defence is different from that of the other defendants, as shewn by the answers filed.

*Richard Cassels*, for the defendants other than McLean cited *Beattie v. Lord Ebury*, 29 L. T. N. S. 419; *Saunt v. Taylor*, 2 Beav. 346; *Reade v. Sparkes*, 1 Molloy 10; *Clinch v. Financial Corporation*, L. R. 5 Eq. 450; *Barrett v. Campbell*, 7 P. R. 150; *Marshall* on Costs, p. 43; Article in 18 C. L. J. N. S. p. 3; *Bank of British North America v. Ainley*, 7 U. C. R. p. 521; *Exchange Bank v. Barnes*, and *Exchange Bank v. Springer*, (unreported.)

*Creelman*, in reply. What is contended is, that three counsel fees should not have been allowed; it is not the amount of the fees that is objected to, and hence it is not

a mere question of discretion, but one of principle: see *Conolly v. Hill*, 7 P. R. 441.

FERGUSON, J. (after reserving judgment).—The appeals are in respect to the costs in the Court of Appeal. The grounds are: 1. That the taxing officer allowed two bills of costs to the defendants; one to the defendant McLean<sup>7</sup> and the other to the defendants other than McLean and the Company. 2. That the taxing officer allowed a bill of costs in each of the three actions, notwithstanding that an order had been made by Mr. Justice Burton at a certain stage of the proceedings in the Court of Appeal, to the effect that only one appeal book should be printed, with some other minor objections. This last ground was, in effect, confined to the allowance of a counsel fee or counsel fees in each of the three cases in the Court of Appeal. The cases are, I understand, now in appeal to the Supreme Court. There is no contention now as to the costs of the actions down to and inclusive of the judgments.

The appeal was, as I learned prior to the argument, brought before a Judge of the Court of Appeal to be disposed of by him. He, however, refused to hear it, for the reason, as he said, that it should have been brought on before a Judge of this Division of the High Court at Chambers. For that reason it has been brought on before me. Objection was taken that it should not be heard before me, but should have been heard by a Judge of the Court of Appeal. It is not very easy to say with any high degree of certainty which was the proper course, as the Rules and the Act do not seem to be very specific and clear on the subject; but under the circumstances, I thought my proper course was to hear the appeal, rather than turn the appellant around again, and if either party is dissatisfied, and thinks it worth while, he may adopt such course as he may be advised to take to settle the point and place it beyond cavil.

The actions are brought against the defendants other than the company as wrong doers. They are sued for an alleged conspiracy to defraud, which it is alleged they carried into effect by defrauding the plaintiffs respectively.

They are really, as against the defendants other than the company, actions known to the common law as actions of deceit with some additional intensification in the plaintiff's pleading. The defendant McLean is in a position somewhat different from his co-defendants other than the company, as he is the one who had, if any of them had, personal knowledge of the subject in respect of which the alleged deceit took place. He defends, meeting the charge directly. The others also do this, but they say further that they obtained their information from McLean, and that they believed it to be true, and believed that the statement made by them and McLean, which is the foundation of the actions, was true.

As to the first ground of appeal, I am, after looking at the cases to which I was referred, of the opinion that the taxing officer was right in the view that he took. I do not perceive how he could do otherwise. I do not think the authorities relied upon by counsel for the appellant are in point. I do not think the cases at all like the cases of trustees, partners, co-contractors, or joint or even successive owners in respect of title, who sever in their defences.

As to the other ground of appeal, it was stated and not denied that separate bills of costs in appeal were, without objection, taxed and allowed. The only objection is, as to the allowance of counsel fees in each suit. No case has been referred to that I can consider at all an authority for reversing the decision of the taxing officer, and my own opinion is, that the view taken by the officer was the correct one. The cases *Exchange Bank v. Barnes*, and *Exchange Bank v. Springer*, were referred to by the respondent. It was said that Mr. Justice Proudfoot, in January last, decided that in these separate bills of costs should be allowed. I have not succeeded in finding his notes of the judgment, but assuming that the judgment was as stated, it seems to strengthen the view that I have taken in these cases.

I am of the opinion that the appeals should be dismissed, and they are accordingly dismissed, with costs.

*Appeal dismissed, with costs.*



## SLATER V. PURVIS.

*Changing place of trial.*

A motion to change the place of trial in a County Court action from London to Toronto was refused under the following circumstances :

The action was on a promissory note made and payable at Toronto. The plaintiff resided in Montreal, and his solicitor in London. The sole defence was, that the defendant was discharged from liability under the Insolvent Act. The defendant resided in Toronto, and swore that he intended to call two witnesses, the Clerk of the County Court at Toronto, and the assignee of the defendant who also lived there. The plaintiff filed no affidavit on the motion.

[March 16, 1875.—*Rose, J.*]

THIS was a motion to change the place of trial in a County Court action from London to Toronto, enlarged before a Judge in Chambers by the desire of the Master-in-Chambers.

The application was made under sec. 155, C. L. P. Act.

The action was on a promissory note made in Toronto, and payable in Toronto. The defendant resided in Toronto, and had two witnesses who resided there. His witnesses were the County Court clerk, or some one from his office, to produce papers filed in insolvency proceedings, and the assignee. The sole defence was, that the defendant was discharged from liability by a discharge under the Insolvent Act.

The plaintiff resided in Montreal. His solicitor resided in London. It was possible that the plaintiff would not be obliged to call any witnesses.

*Morson*, for the motion.

*Aylesworth*, *contra*.

ROSE, J.—In *Robertson v. Daganeau*, 3 C. L. T. 266, Proudfoot, V. C., reversed the decision of Mr. Winchester, Official Referee, changing the place of trial from Toronto to Chatham.

In that case the plaintiff resided in Scotland, his solicitor in Toronto, his witnesses in or west of Chatham.



The defendant, his solicitor, and all his witnesses, either in or west of Chatham. The difference in expense was named at from \$20 to \$40.

The learned Vice-Chancellor followed *Davis v. Murray*, 9 P. R. 222, a decision of the present Chief Justice of the Common Pleas Division, where he laid down the grounds upon which a change of venue could be obtained, viz: "A preponderance of convenience embracing the consideration of expense, not a bare, but a substantial preponderance; and that a fair or impartial trial cannot be had in the place selected." No doubt "and" may be read "or," as the grounds are two, viz: preponderance of convenience and impossibility of having a fair trial.

It was pointed out on the argument that the costs of this motion will about equal the costs of witnesses attending at London. It is very probable an arrangement can be made by which the documentary evidence can be produced either without any witness going to London, or that, at most, only one witness will be necessary.

This case is not so strong for the defendant as was *Robertson v. Daganeau*. I followed that case as one of a line of cases in *Walton v. Wideman*, 10 P. R. 228; and although the place of trial might, in this case, be changed without much inconvenience to the plaintiff, I think it better not to infringe the rule laid down. There is certainly no very great preponderance of convenience, and the plaintiff has a statutory right to name the place of trial.

That this is a case in the County Court makes no difference in the principle of decision: *Mahon v. Nicholls*, 31 C. P. 22.

The motion must be discharged, with costs to the plaintiff in any event.

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## COCHRANE V. MORRISON.

*Trial of issue by County Judge—Production—Rule 373, O.J.A.*

Where, after judgment in an action in the Common Pleas Division, an issue on a garnishee application was directed to be tried under Rule 373, O.J.A., by a County Judge and jury,

*Held*, that such Judge had no jurisdiction to make an order to produce before trial, and consequently no authority to make any order, on a failure to produce.

[March 16, 1885.—*Rose, J.*]

THIS was a motion for an order to have the issue in this case tried at the next sittings of the County Court of the County of Wellington, or at the sittings of this Court at Guelph; and by way of appeal from the judgment or order of the Judge of the County Court of the County of Wellington, striking out the denial of issue, and for general relief.

*H. J. Scott, Q. C.*, for the motion.

*Black*, contra.

ROSE, J.—It appears that on the 9th of October, 1884, the learned Master-in-Chambers made an order attaching debts and directing the trial of an issue raised by one of the garnishees before the Judge of the County Court of the County of Wellington and a jury, at the then next Court. The order reserved the question of costs and all further questions until after the trial of the issue.

The order, it is said, was made pursuant to Rule 373, O. J. A., as follows:

“If the garnishee disputes his liability, the Court or Judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined.”

After the order was made the plaintiff obtained an order from the Judge of the County Court directing the defendant to produce. An affidavit of defendant not having

been filed in accordance with such order, although his solicitor filed one by himself and explained that he was endeavouring to obtain one from his client, an order was made by the learned Judge striking out the defence or denial of the issue, and declaring the plaintiff entitled to the moneys in question and to judgment, and directing defendant to pay plaintiff the costs of the application forthwith after taxation. This order was dated 10th December, 1884.

The order to produce and to strike out were both entitled in the County Court of Wellington.

The order striking out the defence was made after cause shewn, and thereupon the defendant's solicitor left Guelph, and went home.

The 10th of December was the opening day of the sittings of the County Court, to which day the summons to dismiss had been enlarged.

On the next day, in the absence of counsel or solicitor for the defendant, the case was called on and a jury sworn. The learned Judge directed the jury to find for the plaintiff, and so endorsed on the record, and he thereupon directed judgment for the plaintiff.

I should have noted that on the 10th the entry in the clerk's book was: "Withdrawn by plaintiff on Judge's order directing judgment for plaintiff in Chambers."

In my opinion the learned Judge of the County Court had no power to make the order to produce or to dismiss; the cause was not in the County Court, but in the High Court. The issue directed to be tried before a jury has not been so tried, and there is no return under the order of the learned Master.

If authority were necessary for what appears clear from reading Rule 373 and the learned Master's order, it is found in *Merchants' Bank v. Brooker*, 8 P. R. 133.

The form of trial that was gone through merely evidenced the want of confidence of the plaintiff's solicitor in the validity of the order he had persuaded the learned Judge to grant, but was in no wise a compliance with the order.

As there has in fact been no trial, the entry on the record should be expunged and the issue sent down for trial at the next sittings of the County Court of the County of Wellington for trial of causes with a jury, and all necessary amendments made.

The costs of the abortive proceedings, including trial, and of this motion, to be costs in the cause to the defendant in any event.

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FLETCHER ET AL V. FIELD.

*Costs—Taxation—Special circumstances.*

The bill of costs in question was for professional services rendered the defendant in an investigation of his conduct as a public official before a commissioner appointed by the Ontario Government.

The special circumstances relied upon to enable the defendant to obtain the order for taxation after the lapse of more than a year from the delivery of the bill was, in the words of the defendant, that "there was a distinct understanding between me and the above named plaintiffs that the payment of the said bill of costs was to lie over to await the decision of the Ontario Government, who were by both me and the said plaintiffs, as they stated, expected to pay the said bill of costs, I being one of their officers, and the charges against me having fallen through."

*Held*, that the existence of the above understanding, if proved, was not a special circumstance within R. S. O. ch. 140, sec. 35, to justify an order for the taxation of the bill after the lapse of a year, from its delivery; but that the bill should have been taxed subject to it.

[March 16, 1885.—*Rose, J.*]

AN appeal from the order of the Master in Chambers directing taxation of the plaintiffs' bill of costs sued on herein nearly two years after delivery.

The facts appear in the judgment.

*Aylesworth*, for the appeal.

*Watson*, contra.

ROSE, J.—The defendant is Police Magistrate of Woodstock. Some time early in 1882 an investigation was ordered into his conduct, and His Honor Judge Dean was appointed commissioner for such purpose. He reported



in his favour. The plaintiffs acted as defendant's solicitors, and also assisted at the investigation, Mr. Ball, Q. C., being senior counsel.

The counsel and solicitors for the Crown charged the town as follows:—counsel fees \$500, and solicitors' fees \$240, in all \$740. The total bill charged to defendant is \$593.42 about \$147 less. Mr. Beard, Q. C., senior counsel for the town, and whose firm are now acting as solicitors for the plaintiffs states on affidavit that the charges in the plaintiffs' bill are moderate and fair. No one can know the facts of this case better than he does, and certainly, in weighing the evidence, his long standing at the bar and high reputation, both personal and professional, enable one to rest upon his statements of fact and opinion as to the propriety of the charges with much confidence.

The bill was rendered in April, 1883.

The special circumstance relied upon to enable the defendant to obtain the order for taxation, to use the defendant's own words, was, clause 5 of his affidavit, "That there was a distinct understanding between me and the above named plaintiffs, that the payment of the said bill of costs was to lie over to await the decision of the Ontario Government, who were by both me and the said plaintiffs, as they stated, expected to pay said bill of costs, I being one of their officers, and the charges against me having entirely fallen through."

To use the words of the learned Chancellor in *Arnoldi v. O'Donohoe*, 2 O. R. at p. 327: this agreement if admitted "was not of such a nature as to require it should be first disposed of before a taxation was proper. \* \* \* The proper course is to tax the bill having regard to the special agreement." If therefore the defendant when he received his bill of costs had an agreement with the plaintiff which he could enforce, there was nothing to prevent his having had the bills taxed, having regard to the special agreement.

I am convinced on the affidavit that there was no agreement which the defendant could have enforced. On the contrary, I believe the bill of costs was rendered at his



request: that both he and his solicitors hoped he would get the money from the Ontario Government; that his solicitors were quite willing to wait until he had full opportunity to exhaust all means of inducing the Government to pay it, and that they have waited until it has become a reasonable certainty that the defendant will be left to pay it himself.

I cannot yield to the argument that the defendant when the bill was rendered knew that the charges were excessive and unfair, and was quite willing that the Government should pay the bill even if of such a character without any warning on his part. To accede to it would in my judgment stamp the defendant with great dishonesty. It was certainly his duty to have more closely scrutinized the bill if it was to be paid by another for him than if he paid it himself. His objections to the bill are not such as would be discovered on its face. The charges appear fair and proper. They are only open to objection if the statements made by the defendant are correct, viz., that in fact the work was not done.

Out of regard for the defendant I must assume that when the bill was rendered it did not seem unfair or unjust, and that it was such a bill as he could in honour have asked the Government to pay. If not, he was willing to conspire with the plaintiffs to defraud the Government, and of such conspiracy I certainly on the evidence before me do not propose to find nor do I in the least believe the plaintiffs guilty.

I confess in thus acquitting the defendant of any intent to permit the Government to be defrauded, I am at a loss to account for his present position. If the bill was then a just one for the Government to pay, how is it that it is to-day an unjust one for the defendant to pay? Did he intend to have the bill taxed when it was delivered, and intend to apply so soon as either the Government agreed to pay or determined not to pay? If so was his position with relation to the plaintiffs candid and fair? Had he, as an honest man, the right to obtain grace and favor from them from time to time, not raising any objection to the

bill rendered, concealing from them the intention to tax ? If he all along had the intention to tax, and refrained from the exercise of that right to enable him to gain time from the plaintiffs, I cannot think such conduct a special circumstance within the meaning of the statute.

The defendant states in his affidavit that Mr. Ball did all the work, and that Mr. Fletcher, he thought, was a mere spectator, and that Mr. Finkle took but little interest in the proceedings. Apart from the evidence that both Mr. Fletcher and Mr. Finkle took part in examining witnesses, that Mr. Fletcher addressed the commissioner in argument during and at the close of the case, we have unobjected to for nearly two years a bill, the chief item of which is a charge of counsel fees for nine days.

In a letter written by defendant to plaintiffs' solicitors herein of 23rd December last, after threatened suit, he asks for further time, promises to pay as soon as he finds out what the Government will do, but does not raise a single objection to the bill in gross or to any of its items.

I cannot reconcile the statements in defendant's affidavit with those of Messrs. Beard, Nelles, and the plaintiff Fletcher. I fear, in his anxiety to accomplish his present purpose, he has not carefully weighed his words.

The case of *Arnoldi v. O'Donohue*, 2 O. R. 322, above referred to, in my opinion, was a much stronger case for taxation than this, and I am governed by it. There it was "held on appeal to the Divisional Court that neither the existence of a *controversy as to the terms on which the business was done*, nor the continuance of the employment after the delivery of the first bill, were 'special circumstances' within R. S. O. Ch. 140, s. 35, entitling C. to tax the first bill after the lapse of a year."

Had any dishonesty or impropriety been fairly imputable to the plaintiffs, or a case of hardship been made out, I would have gone as far as possible to relieve the defendant. I find no such grounds. I believe the work was done and the charges fair, and the order for taxation must be set aside, with costs here and below in the cause to the plaintiffs, in any event.

## LAUDER V. CARRIER ET AL.

*Dower—Pleading—Rule 128, O. J. A.*

The statement of claim in an action of dower alleged that the plaintiff was the widow of L., who died seized of such an estate (in certain lands) as to entitle and give the plaintiff an estate of dower therein.

*Held*, that the pleadings in dower are governed by the O. J. A. ; that the right of dower is a legal conclusion from certain facts, and these facts should be stated in the pleading.

The statement of claim was therefore held insufficient, and was struck out, leave being given to amend.

[January 2, 1885.—*Proudfoot, J.*]

[March 21, 1885.—*The Chancery Division.*]

AN action of dower.

The statement of claim alleged that “the plaintiff was the widow of A. W. Lauder, who died seised of such an estate” (in certain lands) “as to entitle and give the plaintiff an estate of dower therein.”

Upon the application of the defendants the Master-in-Chambers ordered the statement of claim to be struck out as being framed so as to prejudice and embarrass the defendants; with liberty to the plaintiff to deliver an amended statement of claim within fourteen days, &c.

The plaintiff appealed.

*S. H. Blake, Q. C., and Grote*, for the appeal.

*Langton and Haverson*, contra.

PROUDFOOT, J.—There is no doubt that, under the former practice, a declaration in an action of dower framed in the general terms of this statement of claim would have been well enough. But under the Judicature Act a more rigid system of pleading has been introduced. Marginal Rule 128 requires every pleading to contain a statement of the material facts on which the party pleading relies. The right of dower is a legal conclusion from certain facts, and these facts ought to be strictly stated in the pleading. In *Harris v. Jenkins*, 22 Ch. D. 481, the plaintiff sought to restrain the obstruction of an alleged private right of way.

It was held that he ought to shew in his statement of claim whether he claimed the right by prescription or grant, and ought to allege with reasonable certainty the termini of the way and its course ; the statement that the plaintiff was entitled to a right of way was a legal conclusion from certain facts which ought to be stated.

In *Davis v. James*, 26 Chy. D. 778, an action on covenants in an expired lease by an assignee of the reversion, it was held that a statement of claim which omitted to shew what the reversion was which the lessor had, and how the plaintiff derived his title to that reversion, was embarrassing ; and it was struck out.

And in *Philipps v. Philipps*, 4 Q. B. D. 127, a statement of claim in an action for the recovery of land, of which plaintiff had never been in possession, was struck out as embarrassing, because it did not allege the nature of the deeds and documents upon which he relied in deducing his title from the person under whom he claimed.

There are several kinds of estates which would entitle a widow to dower, and the defendant is entitled to know upon which of them the plaintiff relies. The objection that the defendants probably know the title better than the plaintiff, will not relieve her from the necessary allegation. As said by Brett, L. J., 4 Q. B. D. 135, "If the deeds had been in the plaintiff's own possession it is impossible to say that those deeds ought not to have been set out, but if they meant to rely on the fact that those deeds are in the possession of the other side, that might excuse a particularity of description, but cannot excuse some statement of it."

The appeal is dismissed, with costs. The order made is in the form of that in *Philipps v. Philipps* and other cases

The plaintiff appealed from this decision to the Divisional Court, Chancery Division, and the appeal was argued by the same counsel.

BOYD, C.—I see no good reason to doubt that the pleadings in actions for dower are to be governed by the provisions of the Judicature Act. See Rule 1 and the forms



of indorsements, at p. 617, of Maclellan's Judicature Act, 2nd ed., where a form of claim for dower is given. That being so, Rule 125 provides that the rules of pleading in the Act shall be substituted for those theretofore used at law or in equity. And Rule 128 provides that every pleading shall contain a statement of the material facts on which the party pleading relies. Dower is an action for the recovery of land, and in such actions it is well settled that the plaintiff must set forth facts disclosing the nature of the title relied on. This is with two-fold intent; first, to enable the Court to judge whether the claim is well founded, *i. e.*, whether, upon evidence being given verifying these facts, the right to the relief claimed would arise; and again, to enable the plaintiff's adversary to meet, by appropriate pleading, the definite facts on which the plaintiff bases the right to recover.

In the present case the plaintiff claims as widow of the testator, who, it is alleged, "died seised of such an estate in the lands [specified] as to entitle and give his widow an estate in dower therein." That is not pleading a fact or a state of facts regarding the title, but simply averring the conclusion of law which the plaintiff deduces from the undisclosed state of her deceased husband's title. It is to be assumed, on this statement of claim, that the plaintiff knows out of what lands, and out of what estate in those lands, she is entitled to dower. She does not plead her inability to disclose more precisely the state of her husband's title, and excuse her general averment by alleging that the defendants well know what that title is—if even that would under the present system suffice, which I very much doubt.

But she comes to claim dower out of defined lands, and because her husband had such an estate in them as will give her dower. Suppose, according to the test suggested by Kay, J. in one of the cases (*Townsend v. Parton*, 45 L. T. N. S. 755), that she proved in terms what she avers and that no other evidence was given. Could she have judgment in her favour? Manifestly not. The Court would



say: "You testify that your husband had such an estate as entitles you to dower. But what is that estate? Because it is for the Court to judge whether that estate is sufficient in law or equity to give you dower, and you must disclose what it is."

If pleadings are to be looked at before the Judicature Act, then models should be sought not in the parliamentary forms of declarations or complaints in the case of legal dower—which as pieces of pleading lack many elements of certainty—but rather in the bills filed in equity for the recovery of dower. Thus in *Van Heythusen's Forms*, vol. i. p. 212, is a bill for dower which avers the title of the husband with precision as one of which he was seised in fee simple in possession. *Gordon v. Gordon*, 10 Grant 467 also manifests that no relaxation of the rules of certainty are permitted in this class of actions, although the title in question is that of the husband, by virtue of which the widow claims.

In *Jerdein v. Bright*, 2 J. & H. 325, where the plaintiff sued "as assignee of a debt," a demurrer was allowed because this was not a sufficient allegation of the plaintiffs' title. Sir J. Stuart, V. C., in *Parker v. Nickson*, 4 Giff. 311 says: "It is necessary that the plaintiffs should state clearly, distinctly, and with precision the nature of the title under which they claim, and in what character they claim." In *Houghton v. Reynolds*, 2 Ha. at p. 266, Wigram, V. C., says: "It has never been doubted that a plaintiff must state his title with sufficient particularity and detail to enable the defendant to meet the case upon some definite issue."

The recent cases, cited in the judgment of my brother Proudfoot are very clear authorities as to what the manner of pleading is under the Judicature Act in actions for the recovery of land. Unless an exception can be engrafted upon the rules of pleading in that Act in favour of looseness of averment in actions of dower, I see no way of escaping from the conclusion that the pleading cannot be upheld. To engraft such an exception upon the Act would be undesirable, and I think unwarrantable. For the

reason that this form of statement is not in compliance with the directions of the rules as to pleading, the judgment should be affirmed, with costs.

FERGUSON, J.—The pleading that is objected to is a statement of claim in an action of dower.

The pleading states that the plaintiff is the widow of the late Abram W. Lauder, of the village of Parkdale, in the county of York, who died seised of such an estate in the lands as to entitle and give to his widow, the plaintiff, an estate of dower therein.

It also states the death and the date of the death of the late Mr. Lauder, the 20th February, 1884, and that thereupon the plaintiff became absolutely entitled to her dower as his widow in the lands.

Also that the late Mr. Lauder made and published his last will and testament, and thereby devised the lands to three of the defendants (naming them) who thereafter entered into an agreement with the other defendants, (naming them) whereby they claim that they have an interest along with their co-defendants in the lands, by virtue whereof the defendants are all in possession of the lands.

The pleading then states that the plaintiff applied to the defendants for an assignment of her dower: that the defendants refused to give her this, and denied her title to the same.

The counsel objecting to the pleading said, that the chief objection was that the defendants were not informed by the pleading and did not know whether the plaintiff was suing for legal or equitable dower, and they said that by reason of the title of the late Mr. Lauder not being stated, or the character of it indicated by the pleading, the defendants were embarrassed in their defence, and they contended that the facts and circumstances respecting such title should have been stated, saying that what was stated in respect of the title of the late Mr. Lauder was a mere conclusion of law.

Marginal Rule No. 128, says that every pleading shall contain, as concisely as may be, a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved; and I apprehend that the opposite party has the right to expect and to have the fulfilment of this rule, and that a pleading that falls short of doing this may be objected to as embarrassing. When the party pleading fails to fulfil the requirements of the rule he is not, I think, in a position to say to the opposite party that the pleading states that such opposite party occupies such a position that it should be inferred that he possesses knowledge of the facts which the pleading fails to state, and which it was the duty of the party pleading to state, and I think the question here is simply this: Has the plaintiff, in pleading this statement of claim, fulfilled the requirements of the rule above mentioned? In a certain sense it may be considered that the statement that a man died seised of such an estate in the lands in question as entitled his widow to dower out of the same lands is a statement of fact, but I do not see that it is such a statement of facts as is required by this rule. There may be dower where the estate of the husband was an estate in fee simple at law, or where it was an estate in fee in equity, if the husband died beneficially entitled, or if at the death of the husband he was beneficially entitled to an interest whether wholly legal or partly legal and partly equitable, if it was, or was equal to, an estate of inheritance in possession other than a joint tenancy, or if the husband was entitled to a right of entry such as is defined in R. S. O., ch. 126, sec. 2, if the action is brought in proper time. A widow may also be entitled to dower where the estate of the husband was an estate of inheritance such as an *estate tail*, and there may be other circumstances under which dower may be had. Formerly she was entitled to dower as against those claiming under the husband even where the estate of the husband was *tortious*.

Now, looking at the many kinds of estates of the husband that might entitle his widow to dower, the many states or conditions of fact in respect to the title of the husband that would give her this right, I cannot think that the bare allegation in this respect contained in this statement of claim amounts to a statement of the material facts on which the plaintiff relies, or that it is a compliance with the rule above referred to; and as I have already said, I think the defendants are entitled to have from the plaintiff a compliance with this rule.

It may be quite correct, as stated in the judgment of Mr. Justice Proudfoot, that the pleading would be sufficient under the former law; but I think the proceedings in an action of dower are comprehended in the provisions of the Judicature Act, and that the defendants have the right to insist upon the rules of pleading being observed by the plaintiff. This they do; and I am, for the reasons that I have endeavoured to give, of the opinion that the judgment should be affirmed, with costs.

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## THE QUEBEC BANK V. RADFORD ET AL.

*Judgment—Rule 80, O. J. A.—Married Women's Property Act, 1884.*

Judgment was granted under Rule 80, O. J. A., in an action on a promissory note against one of the defendants, a married woman, as indorser, where the note matured after the passing of the Married Women's Property Act, 1884 (47 Vict. ch. 19 (O.)), and where there was no allegation that the married woman was possessed of separate estate.

The order provided that the judgment should be levied out of the defendant's separate property (if any) which she was possessed of or entitled to at the time of the making of the note, or which she may thereafter acquire or have acquired, and which she was not restrained from anticipating.

[March 25, 1885.—*The Master-in-Chambers.*]

AN action against the defendants as makers and endorser of a promissory note dated 16th December, 1884, the defendant Anna Radford, a married woman, being the endorser.

*D. T. Symons*, for the plaintiffs, moved, under Rule 80 O. J. A., for an order for leave to sign final judgment against the defendant Anna Radford for the amount of the note sued on. He referred to the Act 47 Vic. ch. 19 (O.); *Perks v. Mylrea*, W. N. for 1884, p. 64; and *Kinnear v. Blue*, 10 P. R. 465. There was no allegation that the defendant was possessed of separate estate.

No one appeared for the defendants.

THE MASTER-IN-CHAMBERS, made the order as asked under the terms of the statute, following the cases cited, and directing that the amount of the judgment should be levied and payable out of the defendant's separate property (if any) which she was possessed of or entitled to on the 16th of December, 1884, or out of any separate property which she may thereafter acquire or have acquired, and which she is not restrained from anticipating.

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## CAMERON V. RUTHERFORD ET AL.

*Judgment—Rule 80 O. J. A.—Married Women's Property Act, 1884.*

Judgment was granted under Rule 80, O. J. A., in an action on a promissory note against one of the defendants, a married woman, where the marriage and the maturity of the note were before the Married Women's Property Act, 1884 (47 Vict. ch. 19 (O.)), following *Bursill v. Tanner*, 13 Q. B. D. 691.

[March 27, 1885.—*The Master-in-Chambers.*]

AN action against several defendants on a promissory note. The defendant, Deborah Ann Rutherford, one of the makers, was a married woman. Her marriage and the maturity of the note were before the Married Women's Property Act, 1884 (47 Vic. ch. 19) (O.)

*Lefroy*, for the plaintiff, moved under Rule 80, O. J. A., for an order for leave to sign final judgment against the defendant Deborah Ann Rutherford. He referred to the Act 47 Vic. ch. 19 (O.), and to the following cases:—*Perks v. Mylrea*, W. N., 1884, p. 64; *Kinnear v. Blue*, 10 P. R. 465, and *Quebec Bank v. Radford*, then recently decided and now reported ante p. 619.

*Aylesworth*, shewed cause, and raised a contention not raised in these cases, viz., that the Married Women's Property Act did not govern the case, as the cause of action arose before it came into force.

*Lefroy*, in reply, cited *Bursill v. Tanner*, 13 Q. B. D. 691, where the order here asked was made under precisely similar circumstances.

THE MASTER-IN-CHAMBERS made the order asked, following *Bursill v. Tanner*, *supra*, with the limitations as to execution mentioned in that case, and in *Quebec Bank v. Radford*, ante p. 619.

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## BINGHAM V. WARNER.

*Jury notice—Chancery Division.*

The action was brought in the Chancery Division to obtain specific performance of a covenant to repair, or for damages.

*Held*, that it was really a common law action, for specific performance of such a covenant could not be decreed, and the defendant was therefore entitled to the benefit of his jury notice.

[March 30, 1885.—*Ferguson, J.*]

THIS was an action in the Chancery Division, brought by a landlord against his tenant for breach of a covenant to repair. The plaintiff claimed specific performance of the covenant, or damages.

The defendant served a jury notice, which the plaintiff applied to strike out on the ground that the action was for specific performance, and was therefor one "over which the Court of Chancery had, at the time of the passing of the Ontario Judicature Act, exclusive jurisdiction," and which should by sec. 45, O. J. A., be tried according to the former practice of the Court of Chancery, *i.e.*, without a jury, unless a jury was specially ordered.

The Master in Chambers made an order striking out the jury notice, and the defendant appealed to a Judge in Chambers.

*Hoyles*, for the appeal, cited *Bank of B. N. A. v. Eddy*, 9 P. R. 468. What must be looked at here is not the form which the statement of claim takes, but the gist of the action. The statement of claim prays specific performance, but specific performance of a covenant to repair will not be decreed by a Court of Equity: *Rayner v. Stone*, 2 Eden, 128; *Errington v. Aynesly*, 2 Bro. Ch. Ca. 343; *Kay v. Johnson*, 2 Hem. & Miller, 118; *Paxton v. Newton*, 2 Sm. & Gif. 437; *Campbell v. Simmons*, 15 Gr. 506; *Dickson v. Covert*, 17 Gr. 321; *Fry on Specific Performance*, 2nd ed., ss. 76-81; *Rawle on Covenants*, 652.

*Cattanach*, *contra*. This is in form an action for specific performance, and it cannot be said at this stage (before

trial) that it is not really so. *Baumann v. James*, L. R. 3 Ch. Ap. 508, shews that specific performance of such a covenant will be decreed. He also referred to *Vermilyea v. Guthrie*, 9 P. R. 267.

FERGUSON, J.—I am sorry not to be able to agree in the view of the learned Master. I think this nothing more or less than what is known as a common law action. I think the authorities referred to by Mr. Hoyles entirely support his contention. I am of opinion that the defendant is entitled to the benefit of his jury notice, and that the appellant should succeed.

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BULL V. NORTH BRITISH CANADIAN INVESTMENT  
COMPANY (LIMITED) ET AL.

*Amending statement of claim—Changing place of trial—Rule 179, O. J. A.*

The plaintiff having in his statement of claim named Toronto as the place of trial, afterwards amended it on *præcipe* under rule 179, O. J. A., naming Belleville as the place of trial.

*Held*, on appeal, affirming the decision of the Master-in-Chambers, and following *Frietsch v. Winkler*, 3 Ch. Chamb. 109 (decided under Chy. G. O. 81, which is substantially the same as rule 179), that no change of the place of trial could be made by amendment of the statement of claim.

[April 7, 1885.—*Rose, J.*]

THIS was an appeal from an order of the Master-in-Chambers disallowing an amendment of the plaintiff's statement of claim under Rule 179 O. J. A., in so far as it changed the place of trial from Toronto to Belleville.

*Millar*, for the appeal.

*Urquhart and Creelman*, contra.

ROSE, J.—Rule 179 provides that “the plaintiff may, without any leave, amend his statement of claim once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at

any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared.'"

This is substantially the practice which obtained in the Court of Chancery prior to the Judicature Act under G. O. Chy. 81, save that the amendment is now made without an order, whereas it was then made under an order of course obtained on *præcipe*.

At Common Law prior to the Judicature Act, where the plaintiff wished to have the trial at a place different from that named in the margin of the declaration, he could obtain an order to amend the declaration by altering the venue upon making out a case for such change. The application in such a case was not a matter of course. See *Mercer v. Vogt et al.*, 3 P. R. 94, and cases there collected.

It will be observed, however, that the motion was to *amend the declaration*.

This practice lends much force to the argument that under Rule 179, where the plaintiff has leave to amend his statement of claim, and is not restricted by the language of the Rule, he could amend so as to change the place of trial.

In *Frietsch v. Winkler*, 3 Ch. Chamb. 109, however, Strong, V. C., stated his opinion to be that no change of venue could be made under an order to amend, and so held. As I have pointed out, the G. O. Chy. 81 was substantially the same as Rule 179, and I therefore follow that decision, leaving the parties, if so advised, to have the question further considered.

On the return of the notice of motion I enlarged the matter to enable the plaintiff to make a substantive motion for change of place of trial, as he and his client stated that naming Toronto as the place of trial was a slip, and not pursuant to instructions.

I have considered the affidavits filed by all parties, and cannot, consistently with the decisions, make the order asked for. The plaintiff shews four witnesses in Belleville, the defendants six in or west of Toronto.

The appeal must be dismissed, as also the motion to

change the place of trial. Costs to be costs in the cause to the defendants in any event, the costs to be taxed as if the appeal and motion were one motion and an enlargement thereof.

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### BAKER v. JACKSON.

*Examination of witness de bene esse—Ex parte order—Affidavit of information and belief.*

*Held*, following the former Chancery Practice, that a local Judge may make an *ex parte* order for the examination of a witness *de bene esse*, on the ground that he is dangerously ill, and not likely to recover. *Semble*, that an affidavit of the solicitor of his information and belief, with the grounds thereof, that the witness is dangerously ill is sufficient. The affidavit, and the circumstance that the order was not acted upon for thirteen days after it was issued, were regarded as unsatisfactory, and limitations were imposed upon the use at the trial of the evidence taken under the order.

[April 7th, 1885.—*Rose, J.*]

AN action in the Common Pleas Division.

This was an appeal from an order of C. R. Horne, Esq., Local Judge of the High Court at Essex, directing the examination of a witness *de bene esse*, on the ground that he was dangerously ill and not likely to recover. The order was made *ex parte*.

It was argued that this was irregular, that it should have been made upon notice, and if so that the learned Judge had no jurisdiction.

*H. J. Scott*, Q. C., for the appeal.

*Holman*, contra.

ROSE, J.—In 1863, the late learned Chief Justice of Ontario, then Vice-Chancellor, in the case of *Oliver v Dickey*, 2 Ch. Chamb. 87, granted *ex parte* an order to examine a witness *de bene esse* on account of ill health. The cases of *Tomkins v. Harrison*, 6 Madd. 315; *Hope v. Hope*, 3 Beav. 317; *McKenna v. Everitt*, 2 Beav. 188;



*Bellamy v. Jones*, 8 Ves. 30; and *Ayckbourn's Pr.* 165, were cited. This case was followed by *Crippen v. Ogilvy*, same vol., p. 304.

In the case of *Bidder v. Bridges*, 26 Ch. D. 1, decided in the Court of Appeal in England, on the 19th of January, 1884, in appeal from the Chancery Division, the practice is considered and reviewed, the above cases being also cited. It was there held that "an order to examine witnesses *de bene esse* merely on the ground that they are over seventy years of age may be made *ex parte*, but it is not of course, and is subject to be discharged upon cause shewn." Rule 423, Ontario Judicature Act declares that "the powers and authority of a County Court Judge," *i.e.*, Local Judge of the High Court, "to make *ex parte* orders shall not be subject to the limitation set forth in the preceding paragraph (422), and may be made though the solicitors for all parties do not reside in the same County." By rule 406 it is provided that "except where (by the practice existing at the time of the passing of the said Act) any order or rule has heretofore been made *ex parte* absolute in the first instance

\* \* no motion shall be made without previous notice to the parties affected thereby. \* \* \*

By sec. 17, sub-sec. 10, O. J. A., if there "is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail."

I must hold that by the practice of the Court of Chancery existing at the time of the passing of the Judicature Act an order to examine a witness *de bene esse*, on the ground of ill health, was made *ex parte* absolute in the first instance and hence that the learned Local Judge had jurisdiction to make the order in question.

Mr. Scott further urged that the affidavit was insufficient being made upon information and belief of the solicitor, and not supported by an affidavit of the medical attendant.

Mr. Holman said in answer that the witness was the deputy sheriff, and his condition of health was a matter well known to the Judge and all parties concerned. This

of course may have been, and if so probably the learned Judge did not think it necessary to require further evidence.

By Rule 284 on interlocutory motions statements as to deponent's belief, with the grounds thereof, may be admitted. The affidavit states that the deponent was informed by Frank E. Marcon. It is not shown who he is or what means of knowledge he had. From other papers before me I have no doubt he is the deputy clerk of the Court at Sandwich, and is the person named in the order as examiner.

I find, however, that the order was taken out on the 18th of March, and not served until the 25th, the appointment not applied for until the 24th, and then taken for the 31st. These dates do not indicate a then present apprehension of death being imminent. The delay is not explained.

Looking at the unsatisfactory nature of the material upon which the order was granted, and the above dates, I think I should vary the order by directing that before the evidence be given it must be shewn to the satisfaction of the learned Chief Justice, who opens his Court at Sandwich to-day—by *viva voce* testimony if he so require—that at the time of making the order, *i.e.*, on the 18th of March, the witness was so ill as to render it unlikely that he would be able to attend the trial, and that he is in such a condition at the time of the trial.

I am led to make the order in this form, because when the motion was first brought on before me I enlarged it from the 30th of March to the 4th of April, with permission to the plaintiff to proceed with the examination at his own risk, and to the defendant to attend on the examination without prejudice to the motion. The examination has taken place and, as I have said, the Court opens to-day.

I think this order will probably prevent any injustice. The costs will be costs in the cause.

*Archbold's* Pr. of the C. L., 13th ed., p. 303, may be referred to as to the material then required to support such a motion at Common Law.

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## DAVIES BREWING AND MALTING CO. V. SMITH.

*Execution—Sheriff—Levy—Creditors' Relief Act 1880, (O.)*

The plaintiffs placed a writ of execution against the defendant in the hands of the sheriff of Ontario on the 6th December, 1884. The sheriff seized the defendants goods on the 8th December. The defendant made a mortgage of his goods to D on the 9th December. B placed a second execution against the defendant in the hands of the sheriff on the 22nd December. On the 31st December the mortgagee, D, paid to the sheriff the whole amount of the first execution \$115, specially appropriating the payment to that execution.

*Held*, that the money paid to the sheriff was not levied by him within the meaning of the Creditors' Relief Act, 43 Vic. ch. 10 (O.), and that the first execution creditor was entitled to the whole of it.

[April 5, 1885.—*The Master-in-Chambers.*]

[April 10, 1885.—*Rose, J.*]

*Holman*, for the sheriff of Ontario, moved for an interpleader order.

*J. R. Roaf*, for the claimant, Deans.

*Watson*, for the first execution creditors, the Davies' Brewing and Malting Company.

*H. D. Sinclair*, for the second execution creditor, one Bennet, asked that the sheriff should be ordered to pay to Bennet, pursuant to the Creditors' Relief Act, 43 Vic. ch. 10, (O.) a rateable proportion of a sum of \$115, paid to the sheriff by Deans.

The facts appear in the judgment.

THE MASTER-IN-CHAMBERS.—In this case it is thought better that I should now decide the question as to the right of the first execution creditor, the Brewing & Malting Co., to the sum of \$115, paid to the sheriff on that execution.

The first execution was delivered to the sheriff, 6th December, 1884; the second execution, Bennet's, was delivered to the sheriff, 22nd December, 1884; the mortgage to William Deans on defendant's goods was given 9th December, 1884.

The order of priority is therefore :

1. Execution—the Brewing Company.
2. Deans's mortgage.
3. Bennet's execution.

The sheriff seized the defendant's goods on the 8th December. On the 31st December the mortgagee, Deans, paid to the sheriff the whole amount of the first execution, being \$115, specially appropriating the payment to that execution, and the sheriff in like manner receiving the money on that execution.

Deans's intention in making the payment was to protect his own mortgage, for the first execution stood before his mortgage. Mr. Deans has put in an affidavit as to the circumstances, which I cite: "On or about the 30th day of December last, the sheriff's officer being in possession of goods of the defendant under an execution, issued by the Brewing and Malting Co., I raised money for the purpose of paying off the said execution claim, and sent the same to the sheriff of the County of Ontario. Part of the said money was borrowed by me, and part thereof was my own money; no portion thereof was money of the defendant John G. Smith, nor was any portion thereof paid by him. The full sum so paid is yet to be repaid, and I am advised and believe that the said moneys are the moneys now in the hands of the said sheriff, and that the execution then became my property, and was actually stayed; and that no person without my permission has now, or has had, since the said payment, any control over the said execution. In paying the said money I intended to satisfy the claim of the said plaintiffs as well as protect my chattel mortgage."

The sheriff's affidavit states that on the 31st December he received \$115 in cash, paid by the defendant John G. Smith as the balance of the first execution.



There is no application for leave to put in any further affidavit on the point—there is not necessarily an inconsistency—and I take Mr. Deans's affidavit as shewing the exact facts.

And I think the facts shew that the \$115 was not levied by the sheriff under the Creditors' Relief Act, and that the first execution creditor is entitled to the money. It must be observed that the payment was made by Deans to relieve his own property from the charge of that execution: that it was his, Deans's, own money that he paid. The sheriff therefore was never for an instant in a position to seize the money, or to say I will take this money on this or that. He had no authority or discretion to exercise as to how he would receive it; he had to take it as Deans paid it, or not at all, and he did so take it on the first execution.

The Creditors' Relief Act is meant to secure a distribution of the debtor's estate realized on executions equally among the execution creditors. But this money was never any part of the debtor's estate.

It is quite out of the question to suppose the Act intended to prevent a third party interested in some part of the debtor's estate from paying out with his own money some particular execution (as here) which he finds to be an encumbrance on his own interest. Or take another case, that one of the executions against the judgment debtor was against the judgment debtor and another jointly. Can it be thought that the Act would prevent that other debtor from paying to the sheriff the amount of that execution, and so discharging it, without paying all the executions which stood against the judgment debtor severally? The relations of debtor and creditor show that this cannot be. And as the case is not within the Act either substantially or technically, so neither can any subsequent execution creditor be honestly entitled to any portion of the money, as against the first execution. The security of the second execution creditor is not diminished by the transaction. So my order will be, that this



money be paid over to the Brewing and Malting Co. on their execution, and that the execution creditor Bennet be barred, and do pay all costs connected with this part of the case either of the sheriff or of the parties.

I should say that I undertake to adjudicate on this at the request of the parties.

The second execution creditor appealed, and the appeal was argued by the same counsel.

ROSE, J., affirmed the decision of the Master.

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#### THE UNION LOAN AND SAVINGS COMPANY v. BOOMER.

*Reference under sec. 47 O. J. A.—Jurisdiction of Master in Chambers—  
Rule 323 O. J. A.*

*Held*, following *White v. Beemer*, *ante* p. 531, that The Master-in-Chambers has no jurisdiction to order a reference under sec. 47 O. J. A.

An appeal from the Master's order directing a reference was treated as a substantive motion, and a reference was directed, under Rule 323 O.J.A.

[April 14, 1885.—*Rose, J.*]

THIS was an appeal from an order of the Master-in-Chambers referring, under sec. 47, O. J. A., to John Winchester, Esq., to enquire and report the amount in which the defendant is indebted to the plaintiffs under the mortgage in question herein.

The action was for principal moneys, four years' arrears of interest, insurance, taxes, and costs of abortive sale.

A motion for judgment under Rule 80 was made, but on the defendant filing an affidavit stating that the plaintiffs had been in possession and in receipt of rents and profits, and that he had a claim against them for waste, the Master was of the opinion that he could not make the order asked for, but made an order as above, from which the defendant appealed.

*W. H. P. Clement*, for the appeal.

*Shepley*, contra.

ROSE, J.—It is contended that the Master in-Chambers had no jurisdiction to make an order of reference under section 47 or 48, O. J. A. The learned Chancellor's decision in *White v. Beemer* (a), was referred to. It is now in press, and I have been furnished with a copy of the printer's proof. No doubt it was not brought to the notice of the learned Master. It is expressly in point and I must follow it.

The order as made was a most fair one under the circumstances, and I think the defendant might well have submitted to it, as a not expensive mode of determining the plaintiff's claim. It did not profess to deal with matters forming ground of counter-claim, which the defendant could still urge, if well founded.

Mr. Shepley urged that under the provisions of Rule 323 I could make an order similar to that made by the Master. It seems to me I may do so.

I accordingly direct that it be referred to *John Winchester*, Esq., to enquire and report under the provisions of Rule 47 the amount: 1. Of principal and interest overdue on the mortgage in question. 2. The amount paid by the defendant on account of principal or interest or received by the plaintiff either for rent or otherwise in respect to the mortgage or lands thereby conveyed. 3. Amount paid by the plaintiffs (a) for drawing mortgage, (b) for taxes (c) for insurance, (d) for costs of abortive sale.

The plaintiffs are to furnish the defendant with such particulars of claim as may be demanded.

I reserve to the defendant all rights of counter-claim to be urged in an independent action, or if he desire the enquiry and report will also be as to: 1. Value of premises alleged to have been burned during the plaintiffs' possession. 2. Rents which might have been received but for the plaintiffs' negligence. 3. Depreciation of premises

(a) Now reported ante p. 531.

while in plaintiffs' possession from neglect or want of repair.

The defendant is to deliver to the plaintiff full particulars of his counter-claim upon demand.

Mr. Winchester will also enquire and report as to any other question not above specially referred to, and arising in this action, and, if defendant desire, also arising out of the counter-claim.

The defendant is to elect whether he desires a reference as to counter-claim on or before Friday next. If any difficulty arise as to terms of order, it may be spoken to on that day.

The defendant would be entitled to his costs of appeal and of opposing the motion below, but the plaintiffs would also be entitled to the costs of a motion to a Judge in Chambers for the order now granted. On the whole I think the fairest order will be, to give no costs of the motion below or of this motion to either party.

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## WALKER V. WALKER.

*Interim alimony.*

*Held*, that the principle which underlies all the decisions is, that the allotment of alimony *pendente lite* depends upon the marital relationship of the parties existing *de facto*.

The Court exercises a discretion in granting or withholding alimony *pendente lite* which is regulated by the circumstances of each case. And the defendant in this action by his own act and conduct having clothed the plaintiff with the reputation of being his wife, although he denied the marriage, the decision of the Master awarding *interim* alimony was not interfered with.

[April 22, 1885.—*Boyd*, C.]

AN appeal by the defendant from an order made in Chambers by the Local Master at Hamilton, awarding the plaintiff *interim* alimony, in an action in which the plaintiff claimed alimony on the ground of desertion.

The plaintiff swore that she was married to the defendant, giving the time, place, and circumstances of the marriage ceremony; but the defendant denied that the plaintiff was his wife, or that he had ever gone through any ceremony of marriage with her, and swore that she had been merely his kept mistress, though he addressed letters to her as his wife, and called her his wife, in order that he might live with her undisturbed.

The facts appear more fully in the judgment.

*Lash*, Q.C., for the appeal.

*Hoyles*, contra.

BOYD, C.—In awarding *interim* alimony the Court should be solicitous to guard against falling into either of two evils: on the one hand, to guard against giving encouragement to a mere adventuress in seeking to levy tribute upon a defendant with whom she has had meretricious intercourse; and on the other, to guard against disabling a wife from vindicating her right to support at the hands of her husband, by refusing the means of proving that she is his wife, because he makes a preliminary denial of the marriage. If there is no evidence that she occupies the

*status* of wife, if upon her own shewing she appears to have no cause of action, then, of course, alimony will not be ordered. If, on the other hand, as here, she swears to the fact of marriage, and that is denied under oath by the defendant, and corroborating evidence is put in on both sides, how is the Court to deal with such a case of conflict? The authorities, English and Canadian, go to this extent—that where it appears from the admissions of the parties, or from the affidavits of the one not impeached by the other that there has been a ceremony of marriage between them and the real controversy is whether that is a valid marriage, then the Court adjudges that the litigation should be carried on at the expense of the putative husband, and that the plaintiff should receive *interim* support from him. The principle which underlies all the decisions is, that the allotment of alimony *pendente lite* depends upon the marital relationship of the parties existing *de facto*.

In the present case, while the defendant does deny, and brings strong confirmatory evidence to support his denial, that the marriage was celebrated in time and manner and place as alleged by the plaintiff, yet he does not and cannot deny the existence of facts from which a marriage *de facto* may be inferred from conduct and reputation. It is proved that she was conceded the ostensible *status* of his wife in Brantford and St. Catharines, that the defendant introduced her to various persons as his wife, and that he sent by post letters addressed to her as “Mrs. Frank E. Walker.” She took his name, and by that name was known and spoken to by the defendant and by others with his knowledge and sanction.

Another circumstance which weighs very strongly with me is, that he gives no explanation, at all intelligible or satisfactory, of the vehement insistence with which he urges her to contract marriage with the person named in his letters. His explanation that he pretended to her that he was married to some one else in order to get rid of her taken in connection with his expressions in the letters would shew that his argument was of this complexion:



inasmuch as I have committed bigamy I desire that you should do so too, because then (to borrow his own words) "you will be standing in exactly the same position as I am in." These points may be all satisfactorily cleared up and explained by the testimony adduced for the defendant at the trial of the action, but I am not able on the present materials to say that there is no reasonable evidence of a marriage *de facto* sufficient for the purposes of this preliminary application.

The defendant by his own act and conduct has clothed the plaintiff with the reputation of being his wife, and this allowance of *interim* alimony is no more than a continuation against him of a state of affairs which he himself initiated and sanctioned. The Court exercises a discretion in granting or withholding alimony *pendente lite*, which is regulated by the circumstances of each case. The learned Master has here awarded alimony, and I am not satisfied that his decision should be interfered with, and it will therefore be affirmed with costs.

But I think that the plaintiff should bring on the cause for trial without delaying till the autumn. I am willing that the case should be added to my Toronto list; if this is not done, then *interim* alimony will cease from June till the time of trial at Hamilton.

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**\*MORTON V. HAMILTON PROVIDENT AND LOAN SOCIETY.**

*Mortgage—Sale under power—Surplus—Account as to—Scale of costs—  
Rule 515 O. J. A.*

Mortgagees after the exercise of the power of sale in their mortgage claimed that \$182.61 was still due to them, but on an account being taken \$20.07 was found due to the mortgagor.

*Held*, that laying aside the question of the whole amount of the mortgage money (\$6.705) the amount involved was \$202.68 and therefore the case was not within rule 515 O. J. A. (C. S. U. C. ch. 15 sec. 34, subsec. 8), and the costs were properly taxed on the higher scale.

The claim of a mortgagor against a mortgagee for an account in such a case is not a legal one as for a money demand, but a proper subject for equitable relief

[April 22, 1885.—*Proudfoot, J.*]

AN appeal by the defendant from the taxing officer, who allowed the plaintiff costs on the higher scale.

The plaintiff made a mortgage to the defendants in consideration of \$3,525 and interest, to be repaid in quarterly instalments during a period of fifteen years, amounting to \$6,705, in sixty quarterly instalments of \$111.75 each.

Some payments were made upon the mortgage, amounting to \$675.65, but, default having occurred, the defendants sold under their power of sale for \$4,300, which sum was paid to them.

The plaintiff, in his statement of claim, set forth the particulars as above, giving the dates, and claimed that the defendants had received much more than they were entitled to, and asked to have an account taken of the sum due on the mortgage, and of the sums received by the defendants on account of it, and that the defendants might be declared trustees to the plaintiff in regard to that money, and might be ordered to account for it.

The defendants by their statement of defence set out the conditions of the mortgage, and set out in detail the items of their account for claim upon the mortgage, and of the money received by them, and claimed a balance due to them of \$137.61.

The action was referred to the Master at Belleville, and after two successful appeals from his report by the defend-

\* An appeal from this decision to a Divisional Court is now pending.

ants, the matter was referred to the clerk in Chambers, who made a final report, finding a balance due the plaintiff of \$20.07, including interest from the 1st December, 1879. The Master also reported that before the commencement of the proceedings in this suit a statement was rendered by the defendants to the plaintiff in which they claimed a balance of \$182.61, with interest from 1st December, 1879, and threatened taking proceedings to collect the same.

The judgment on further directions ordered payment of the amount found due and costs by the defendants to the plaintiff. The taxing officer taxed the costs on the higher scale, and the defendants appealed.

*Muir*, for the appeal. This case does not differ from an action by a shop-keeper to recover the amount of an account. It is not a case of seeking "equitable relief," as intended by Consol. Stat. U. C., ch. 15, sec. 34, subsec. 8. The relief sought is purely legal. The defendants having received \$4,300 on the 1st December, 1879, were bound "legally" to pay any surplus to the plaintiff. See *Carden v. The General Cemetery Co.*, 5 Bing. N. C. 253; *Moxon v. Bright*, 4 Ch. App. 292; *Phillips v. Phillips*, 9 Hare, 471. The action should have been brought in the County Court.

*Watson*, contra, cited *McGillicuddy v. Griffin*, 20 Gr. 81.

PROUDFOOT, J.—The defendants contend that their liability is a legal one as for a money demand, and involves no claim for equitable relief by the plaintiff, and reference was made to R. S. O. ch. 104, p. 998, the Short Forms of Mortgages Act, and the extended meaning given to the short power of sale, the mortgage being made under that Act; and to the case of *McKay v. Mitchell*, 6 U. C. L. J. 61.

The Short Forms of Mortgages Act declares that the mortgagees, after exercising the power of sale, are to hold the money *upon trust* to pay expenses, &c., and the amount due to them, and after satisfying all such sums, *upon trust* to pay the surplus to the mortgagor. If any

inference is to be drawn from the language of that statute it is that the plaintiff's claim is an equitable one to enforce a trust.

In *McKay v. Mitchell* the defendants were mortgagees with a power of sale, and covenanted to pay any surplus to the mortgagor. It was a garnishment case, the mortgagees were the garnishees, and the amount due from them was admitted. It was held that this was a debt to which the covenant applied, and the mortgagor did not complain. But the present is entirely different from that case, for the mortgagees here did not admit that they had any surplus payable to the mortgagor, but insisted that he was owing them a balance of \$182.61, with interest.

In order to ascertain what was due to the plaintiff it was necessary to take an account, and an account was in fact taken of the whole amount due on the mortgage. It is true that the defendants admitted the amount realized by the sale, but they claimed it did not satisfy them. The plaintiff did not impeach the sale, but required an account.

Claims of that kind have always been considered a proper subject for equitable relief. *Ford v. Allen*, 15 Gr. 565, is an instance. *Warner v. Jacob*, 20 Ch. D. 220, is another. In that case it was held that a mortgagee with a power of sale which he had exercised was a trustee of the surplus money for the mortgagor. And this case was recognized by the Chancellor, in *Beatty v. O'Connor*, 5 O. R. 747.

The C. S. U. C. ch. 15, sec. 34, sub-sec. 8, enabled a person seeking equitable relief, where the subject matter involved did not exceed \$200, to sue in the equitable jurisdiction of the County Court. That jurisdiction has been abolished, but Rule 515 of the Judicature Act fixes a lower scale of costs for such cases. The amount involved here, laying aside the question of the whole amount of the mortgage, was the claim of the defendants for \$182.61, and interest due to them, and the sum of \$123.27 found due by the master to the plaintiff.

These two sums amount to.....	\$182.61
	123.27
	<hr/> \$305.88

It seems perfectly plain, therefore, that this would not have been a case in which resort could have been had to the equitable jurisdiction of the County Court, and the taxing officer was right in taxing on the higher scale.

When I wrote the foregoing neither the judgment on further directions, nor the certificate of the Clerk in Chambers, if there was one as mentioned in the statement of the case, was left with me. The report of the Master of the 10th of January, 1885, shewed \$88.60 as due to the plaintiff on the basis of the sale to one Robertson, and a special finding in that report on the basis of a sale to one Mickel found due to the plaintiffs, \$123.27. By referring to the order made on the 9th of February, 1885, upon an appeal from that report, as entered in the Chambers entry book, my only source of information, I find that the report on the basis of the sale to Robertson was set aside, and that the special finding on the basis of the sale to Mickel was affirmed. But alterations were made in sums charged for rent and other matters which reduced the ultimate balance found due to the plaintiff to \$20.07 as set out above. This, however, does not affect the principle of the decision as the amount involved still exceeds \$200.

\$182 61
20 07
<hr/> \$202 68

*The appeal is dismissed, with costs.*



## DEMOREST V. MIDLAND RAILWAY COMPANY, ET AL.

*Tender—Payment into court—Judgment—O. J. A.*

The action was to recover money as compensation for land expropriated, and for other relief. Defendants pleaded a defence in denial, and also a tender of \$400 and interest, but did not pay the amount into Court. *Held*, that the defence of tender without payment into Court was a good defence under the Ontario Judicature Act, and a motion to strike out the defence, or to compel payment into Court, or for judgment for the amount, with leave to proceed for a further amount, was refused.

[April 30, 1885—*The Master-in-Chambers.*]

AN action to recover money as compensation for land expropriated by defendants, and for a *mandamus* to compel the defendants to take steps to have an arbitration as to the amount of compensation, and for an injunction to restrain the defendants from running their trains over the land in question.

The defendants, in their statement of defence, denied the allegations in the statement of claim, and alleged, *inter alia*, that they had tendered the plaintiff the sum of \$400, but that the plaintiff had refused to accept the same; and they expressed their readiness to pay the plaintiff the said sum of \$400 and interest, but they did not pay the said sum, or any sum, into Court.

The plaintiff in his reply admitted that the defendants had tendered him the sum named in their defence, but he alleged that that sum was wholly inadequate for his just claim.

The plaintiff moved to strike out such portion of the defence as alleged a tender, or for an order for judgment in favour of the plaintiff as to the sum of \$400.

*Holman*, for the motion.

*Hoyles*, contra.

THE MASTER-IN-CHAMBERS.—Under our Judicature Act, I do not think the defendants are compellable to pay money into Court on a plea of tender. There is a defence

in denial on the record here, as well as the tender. It is different now, under the Rules of 1883, in England, where they have introduced the old Common Law Practice as to payment into Court on such a plea. See Order 22, Rule 3 *Wilson's Judicature Acts*, 4th ed. p. 273.

The question then is, under Rule 322, can an order be made for judgment, that is, as on an admission in the pleadings; and on that view the defendants' defence must be taken just as they have pleaded it. It seems to me that notwithstanding the defendants' general denial of the statement of claim, there is that on the face of the defendants' defence which would justify me in making an order for judgment for the plaintiff for the \$400 and interest—that is a final judgment in the whole suit; but the plaintiff does not desire that. I must take the defendants' admission just as they make it, and it is that the defendants are willing to pay the \$400, &c., as all that is due to the plaintiff.

The plaintiff wishes to have the \$400, &c., paid into Court, or to have present judgment for it, with leave to proceed in the action for a further amount on his claim. I dismiss this motion.

I think the costs of this motion should be costs in the cause. I mean in this sense: if the plaintiff fails to recover, or recovers only what the defendants admit, the plaintiff is to pay the costs; if the plaintiff recovers more than the defendants by their defence admit, the defendants are to pay the costs.

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GORING V. THE LONDON MUTUAL FIRE INSURANCE  
COMPANY.*Examination—Discovery—Officers of corporation.*

In an action upon a fire insurance policy against a company,  
*Held*, that the local agent of the company, who received the application and the premium and issued the *interim* receipt, and his successor, who had charge of the agency when the fire occurred, were properly examinable for discovery, before the trial, as officers of the company under the C. L. P. Act.

*Quere*, whether a person may be an officer examinable for the purposes of discovery, but not one whose evidence can bind the company.

[March 13, 1885,—*Rose*, J.]

AN appeal from the order of the Master-in-Chambers setting aside an appointment for the examination before the trial of two local agents of the defendant company, the one occupying the office when the insurance in question in the action was effected, and the other his successor, when the fire occurred, as officers of the defendant company.

*Clement*, for the appeal.

*Aylesworth*, contra.

ROSE, J.—Mr. Clement relied upon the decision of the learned Chief Justice of the Queen's Bench Division, sitting in Chambers, in *Ramsay v. Midland R. W. Co.*, 10 P. R. 48, where he held that a station master in the employ of a railway company was an officer liable to examination.

I refer to two or three sentences in the judgment. "He (the general manager) cannot, however, do everything himself. The business of the company must, therefore necessarily be subdivided among others. \* \* Each department for the transaction of the business of the company becomes a distinct subdivision for the transaction of the particular business of that department. \* \* Now the superintendent of freight or the heads of the other departments \* \* may not be able to manage personally the whole of the work committed to their supervision, and

they may, of course with the knowledge and consent of the chief governing body, or of the general manager, subdivide their respective departments by having freight, passenger traffic, and the like, controlled at certain convenient places along the line by representatives or agents, or by whatever other name they may be called, such persons acting in their respective sub-divisions with the like power as their superiors in the like higher departments under their control." Referring to the station master he says: "He is, of course, subject to the orders and instructions of his superiors; and although he may not, according to the routine in such cases, report to the general manager or to the directors, it is certain he would be bound to report to them if called upon by them to do so, and it is certain if he refused to do so the directors or manager could dismiss him." Referring to the appointment he said: \* \* "nor do I know, nor do I think it of much consequence I should know, who appoints the station agent or station master, but I do know when he is appointed, whether by the directors or by the general manager, or by the superintendent of the particular part of the line, he does become the agent and employee of the company, and is the *officer* of the company in his own department, and as such he is examinable under the statute, and can and may represent the body corporate on and for the purposes of his examination."

"The statute should, I think, receive a liberal construction, for the knowledge of the business and affairs is and can only be in the agents and officers of the company who transact it." \* \* "In this case, too, it is said the station master actually executed the contract upon which the action is brought."

The facts in the case before me are, that one of the parties sought to be examined is the local agent of the company who received the application, and no doubt the premium, and issued the interim receipt which was binding upon the company until the application was accepted or rejected by the company, for from the affidavit of the



defendants' manager filed herein we find such were his powers.

The other person sought to be examined is his successor, who had charge of the agency when the fire occurred.

The powers and duties of the agent appear on the policy, and also in a certain pamphlet filed by the defendants called "Revised Code of Instructions to Agents."

By the statutory conditions we find, No. 3. That any change material to the risk must be notified in writing to the company or its local agent. No. 4. That an agent of the company, duly authorized, has power to endorse on the policy permission to assign. No. 5. In the event of partial damage the agent of the company may permit abandonment. No. 9. If duly authorized, to assent to prior insurance. No. 14, (f.) To permit repairs to buildings, No. 19, To waive conditions of the policy.

No. 20 declares that "Any officer or agent of the company who assumes on behalf of the company to enter into any written agreement relating to any matter connected with the insurance, shall be deemed *primâ facie* to be the agent of the company for the purpose."

Among the variations endorsed on the policy we find No. 14: "As this company's business is of a greatly detached nature, that of almost every agent being scattered over scores of miles of the country, over which it is his duty to be almost constantly travelling; and he may, in consequence, be absent for lengthened periods from his settled home, and might not be easily found, besides having enough to attend to already, the board of directors have thought it best to require any person having urgent business, under sections 3, 4, and 8, and sub-section 1 of section 10 of the aforesaid statutory conditions, to make application to the secretary direct; and he alone has been authorized for any or all of the purposes of the "conditions." Such authority has not been conferred upon any of the local agents, for the reasons stated above."

I imagine sub-section 1, of section 10, is a misprint for sub-section "f" of section 10.



Assuming that these variations are just and reasonable, the local agent would still have power to consent to the abandonment of partially damaged property, and by writing to waive conditions of the policy.

Looking at the code of instructions it would appear, p. 1, that the local agent is appointed by the board of directors. I may say this code is a small book of 33 pages containing, as might be expected, most carefully prepared and detailed instructions as to work to be done by the agent. I give the headings — “Property Insurable,” “Ordinary Contents,” “Applications,” “Diagram,” “Premium Notes,” “Amount Insurable,” “Valuations,” “Table of Valuations,” “Log Buildings,” “Stove-Pipes and Chimneys,” “Tenure,” *i. e.* title; “Character,” *i. e.* of applicant; “Encumbrances,” “Cancelling Risks,” under which an agent is authorized to cancel risks before he thinks it probable the policy has issued. “Additional Insurance,” “Agents’ Territories,” under which we find an agent will be allowed to employ an assistant when deemed necessary by the board. “Due Bills:” under this caption directions are given as to taking due bills, and it is stated that in every case the agent will be held accountable for the premium contained in due bill. “Remuneration,” being a certain sum to be collected from each applicant, and a commission varying from six per cent. to fifteen per cent. “Monthly Report and Remittance:” agents are permitted to retain moneys collected until the end of the month, and then are required to remit amount in hand, less their fees and amount expended by them for postages. “Collections,” “Correspondence,” “Transmitting Applications,” “Postage,” (which is to be paid by the company,) “Printing and Advertising,” (to be paid for by the company, if authorized). “Directors:” agents are required to report to any director in whose neighbourhood they are working, “both as a mark of respect and for the sake of such information as he may obtain,” and is required to “pay the most marked attention to the director’s suggestions.” “The Manager and the Inspector:” obedience to these officers required to be implicit.

“Working for Other Companies :” this is prohibited most expressly as to risks insurable by this company. “Settlement of Accounts :” this is required at least at the end of each year, and it is stated that “An agent *leaving the service of the company* will have no claim on it whatever, either as regards the disposal of his renewals, or in the appointing of his successor.

Other instructions are given, but the above abstract will, I think, fairly represent the relations between the company and its local agents.

To summarize. The agent is appointed by the board, is to report to the board, has charge of a territory, may employ an assistant, but only with the consent of the board, must confine his business as agent for fire insurance to this company, is to take applications, inspect and value risks, give interim receipts, accept premiums, cancel risks, waive conditions, is paid by commission, may retain moneys, make deductions, and report and remit balances monthly ; has his postage, advertising, and printing paid for by the company ; may, in case of fire, permit abandonment ; and is dealt with as a person in the service of the company.

Bearing in mind, that in the words of the learned Chief Justice of the Queen’s Bench Division, “The statute should \* \* receive a liberal construction, for the knowledge of the business and affairs is and can only be in the agents and officers of the company who transact it,” I think I would not be justified in holding, that, having regard to the nature of the business carried on by an insurance company and that carried on by a railway company, the local agent of an insurance company is any less an officer of the company than the station-master in the employ of the railway company.

It would probably be an idle form to examine the officers of the company at its headquarters, and unless these agents can be examined, the right to examine in this and like cases would be a barren right.

It may be that a much greater latitude can be allowed in granting orders for these examinations for discovery if on consideration it is held that the evidence given on them is not necessarily evidence against the company. The statute says that they may be "read in evidence saving all just exceptions." Whether a person may be an officer who may be examined for the purpose of discovery, and not an officer whose evidence can bind the company, has been discussed at the sittings of the Court for trials, but so far as I know has not been formally decided.

Mr. Aylesworth conceded, and I think properly, that if the first agent was examinable so was his successor.

The appeal must be allowed, with costs to the plaintiff in the cause in any event.

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## ONTARIO BANK V. BURK.

*Special endorsement—Judgment—Rules 14 and 80 O. J. A.*

A writ of summons was specially endorsed under Rule 14, O. J. A., "The plaintiffs' claim is \$1,702.72 for money lent by the plaintiffs to the defendant, the same being the amount due to the plaintiffs' branch or agency office at P., and interest thereon from the 1st day of December, 1884, until judgment. On motion for judgment under Rule 80, *Held*, that it was necessary for defendant's information to state the date at which his account was overdrawn to the amount specified, and that this endorsement was therefore insufficient.

[April 14, 1885.—*The Master-in-Chambers.*]

THE writ of summons was specially endorsed as follows, under Rule 14, O. J. A.:—

"The plaintiffs' claim is \$1,702.72, for money lent by the plaintiffs to the defendant, the same being the amount due to the plaintiffs in respect of the defendant's overdrawn bank account with the plaintiffs' branch or agency office at P.; and interest thereon from the 1st day of December, 1884, until judgment."

*Walter Barwick*, for the plaintiffs, moved for an order under Rule 80, O. J. A., for leave to enter final judgment for the amount endorsed on the writ.

*Watson*, for the defendant, objected that the endorsement was insufficient.

THE MASTER-IN-CHAMBERS.—In *Imperial Bank v. Britton*, 9 P.R., 274, I held a similar endorsement with the addition of a date sufficient. What this endorsement lacks is a date. It is necessary for the defendant's information to fix the date at which his account was overdrawn to the amount specified. I refuse the motion, with costs to be costs to the defendant in the cause in any event, but no order is to be taken out now. The plaintiffs may amend the writ and re-serve it on the solicitor for the defendant, and may renew their motion after ten days from the service.

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RATTE V. BOOTH ET AL.

*Parties—Joinder of defendants.*

The plaintiff, the owner of a water-lot and boat house abutting on the Ottawa River, who carried on the business of letting boats for hire, brought an action against four saw-mill owners, alleging that they being each the owner of a saw-mill situated higher up on the river than the plaintiff's lot, had each been in the habit of throwing sawdust, slabs, &c., into the river, and that this waste matter floating down had lodged upon and in front of the plaintiff's water-lot, and had there formed into a solid mass.

*Held*, that the four saw-mill owners were properly joined as defendants in one action.

[February 9, 1885.—*Boyd, C.*]

[March 21, 1885.—*The Chancery Division.*]

THE plaintiff, the owner of a water lot abutting on the Ottawa River, and carrying on the business of letting boats for hire, brought an action against four saw-mill owners, alleging that the defendants, being each the owner of a saw-mill situated higher up the river than the plaintiff's lot, had each been in the habit of throwing saw-dust and slabs into the river, and that this waste matter, floating down the river, had lodged upon and in front of the plaintiff's water lot.

The defendants each obtained a summons from the Local Master at Ottawa calling upon the plaintiff to shew cause why his name should not be struck out of the proceedings ; or, in the alternative, that the names of the other three defendants should be so struck out on the ground of misjoinder.

The Local Master enlarged the summonses to be disposed of before a Judge in Chambers, and the matter came on for argument before the Chancellor, on 9th February, 1885.

*McCarthy, Q.C.*, for the defendants Booth, Perley, and Gordon.

*Clement* for the defendant Bronson.

*MacLennan, Q.C.* for the plaintiff.

Rules 89, 91, 92, 93, 94, 115, and 116, O. J. A. ; *Cunningham and Mattinson*, 2nd Ed. p. 11 ; *Booth v. Briscoe*, 2 Q. B. D. 496 ; *Head v. Bowman*, 9 P. R. 12 ; *Harvey v.*



*G. T. R.*, 7 A. R. 715 ; *Appleton v. Chapeltown Paper Co.*, 45 L. J. Chy. 276 ; *Cox v. Barker*, 3 Ch. D. 359 ; and *Taylor and Ewart's O. J. A.* p. 181, were cited.

BOYD, C., held [the defendants properly joined. The grievance giving rise to a right of relief in the plaintiff was the lodging upon and in front of his premises of saw-dust and slabs. Given, then, this subject matter of litigation, the plaintiff was entitled to join all parties from whom he claimed any relief in respect of such subject matter. The discharge of the summons would not affect the right of the defendants to move for separate trials if so advised.

*Summonses discharged, costs to plaintiff in the cause.*

From this decision the defendants appealed to the Divisional Court, Chancery Division.

*Gormully and Clement*, for the appeal.

*MacLennan*, Q.C., contra.

PROUDFOOT, J.—The plaintiff has a boat house on the river Ottawa, which is a navigable river and a public highway. In his statement of claim he alleges that by virtue of being a riparian proprietor he is entitled to access to and from his land to the river, and to navigate and use the river by boats, steamers, canoes, &c., and to moor the same on the river where it adjoins the plaintiff's land.

The plaintiff brings this action against Booth, the owner of a saw mill about half a mile up the stream from the plaintiff's boat house; and against Perley & Pattee, the owners of another saw mill at about the same distance up the stream; and against Bronson & Weston, the owners of another saw mill at about the same distance up the stream; and against Gordon, the owner or in the use and possession of another saw mill at about the same distance up the stream; alleging that the defendants, and each of them, did for several years before this action, and during the whole of the season of navigation of 1884, throw into cer-

tain channels leading into the Ottawa a large amount of saw-dust, edgings, slabs, and other refuse made in their mills respectively, which were carried by the waters operating these mills through these channels into the Ottawa, to that part of the river fronting and adjoining the plaintiff's land, and these formed a solid mass in the river in front of and adjoining plaintiff's land and his wharf and boat house.

The plaintiff claims damages severally against the four sets of defendants of \$1,000 each, and an injunction against the defendants and each of them.

Each of the four sets of defendants took out summonses from the Local Master at Ottawa to strike out the name of the applicant, or to strike out the names of the other defendants, which were referred by the Local Master to a Judge in Chambers, and they came before the Chancellor on the 9th of February, 1885, who discharged them, the costs to be payable by the defendants to the plaintiff in any event.

The defendants have set this order of the Chancellor down for rehearing.

It was contended that the plaintiff had four distinct causes of action against the defendants, and should not have joined them in the same action.

The Judicature Act, R. 91, provides that "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative." R. 92: "It shall not be necessary that every defendant to any action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein." R. 94: "Where \* \* the plaintiff is in doubt as to the person from whom he is entitled to redress, he may \* \* join two or more defendants." R. 115: "Subject" \* \* (to certain limitations that do not apply here,) "the plaintiff may unite in the same action and in the same statement of claim several causes of action," and gives power to the Court or a Judge to order separate trials.

The language of these orders is wide enough to embrace such a case as the present; but it is said that English decisions have restricted their general terms.

In *Booth v. Briscoe*, 2 Q. B. D. 496, eight persons were held to have properly joined as plaintiffs in an action for libel, though they would before the Act have had to bring separate actions, and though no joint injury was shown. In such a case the damages would be awarded separately.

In *Smith v. Richardson*, 4, C. P. D. 112, a claim was struck out as embarrassing, in which the vendor of goods and the indorsers of a bill given by the purchaser to the vendor for the price, jointly sued the purchaser to recover the price, and also upon the dishonoured bill.

In *Appleton v. Chapelton Paper Co.*, 45 L. J. Chy. 276, the owners of two separate bleach works joined as plaintiffs in a suit to restrain the pollution of a stream used by both their works. The Judge seemed to consider that the plaintiffs could not sue together in one action for distinct nuisances.

In *Burstall v. Beyfus*, 26, Ch. D. 35, it is said that where the cause of action against one defendant is totally disconnected with that against the other defendants, except so far as it arises out of an incident in the same transaction, there is a misjoinder.

These cases sufficiently shew that the English cases have not established a uniform rule of construing these rules. To them may be added the following:

*Honduras R. W. Co. v. Tucker*, 2 Ex. D. 301, where the plaintiff was not certain against which of two parties to proceed, and it was held that he had properly joined both.

In *Child v. Stenning*, 5 Ch. D. 695, the plaintiff claimed damages against S. for a trespass, or in default from W., who had covenants for quiet enjoyment, and it was held he might do so.

Other cases are referred to in *MacLennan's Jud. Act*, 2nd ed., 270.

And in our Court of Appeal, in *Harvey v. Grand Trunk R. W. Co. and Great Western R. W. Co.*, 7 A. R. 715, where injury was done to goods carried by two railway

companies, but the plaintiff was not able to ascertain which line of railway the goods were on at the time of the injury, he was held entitled to join both.

Upon the ground that the present comes within R. 94, and that the plaintiff cannot tell which of the defendants have done the wrong, I think the order of the Chancellor is correct.

But upon other reasoning the same result is arrived at, that there is such a connection between the acts of the defendants as to render them proper to be joined.

The action is not, and could not be, for trespass. The defendants were doing a perfectly legal act in throwing the saw dust and refuse into the river. It was only when these accumulated in a heap in front of the plaintiff's land that any cause of action arose. And it was the united effect of the refuse descending from all the mills and so heaping up that gave the right of action. In this all the defendants were concerned, and although there might have been a separate action against each, there was much more than a mere historical connection between them.

I think the order should be affirmed, with costs.

FERGUSON, J.—The facts are concisely stated by my brother Proudfoot.

After an examination of the authorities referred to on the argument, and considering the matter in contention as well as I have been able, I have arrived at the conclusion that the case falls under the provisions of Rule 91 of the Judicature Act, which provides that all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative ; and that without any amendment judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

The cause of action here is the alleged injury to the property of the plaintiff. The action is for a resulting injury, and is, in character or kind, an action that, under the

former law, would have been denominated an action on the case or trespass on the case, and not an action of trespass for an alleged injury accompanying the act alleged to have been done wrongfully by a defendant.

From a perusal of the pleading it appears to me that there is but one cause of action ; that the subject matter of the action, so to speak, is single ; that is to say, it is the one injury complained of by the plaintiff, though he states facts—makes allegations—shewing damages arising to him in different ways, but all arising from the same cause, the foreign matter filling up the river and polluting the waters thereof opposite to and along the plaintiff's land.

If, then, the plaintiff suing in respect of this single subject matter cannot, under the circumstances disclosed on the face of the pleading, rightly join these four defendants, it is difficult to perceive what meaning can be given to Rule 91. I think it gives the right to the plaintiff to join these defendants as he has done, and I do not see anything in the Act, or in the cases referred to, that is against this.

I am of the opinion that the judgment should be affirmed, with costs.

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## LOCKWOOD V. BEW.

*Interrogatories—Leading questions—Master's office.*

The rules of evidence as to leading questions at a trial cannot be strictly applied to interrogatories administered under a foreign commission in the Master's office.

A party to the suit who, in bringing in his account into the Master's office, files an affidavit verifying it may be asked: "Is the account in the schedule to your affidavit correct?" thus leaving it to the other side to cross-examine, instead of beating about the bush as to each particular item in order to avoid leading questions.

An application to strike out objectionable interrogatories may be made before the issue of the commission to take evidence.

[May 28, 1884.—*The Master-in-Ordinary.*]

[June 2, 1884.—*Proudfoot, J.*]

THIS was an application by the plaintiff to strike out the 1st, 2nd, and 3rd, and the first part of the 6th and 8th interrogatories proposed to be asked the defendant in his own behalf under a commission issued pursuant to Chy. G. O. 221, on the ground that such interrogatories were leading questions.

*Foy, Q.C.*, for the motion.

*H. Cassels*, contra.

MR. HODGINS, Q. C., MASTER-IN-ORDINARY. — The defendant contends that I have no jurisdiction on an interlocutory application to strike out interrogatories; but he concedes that on the return of the commission I should have jurisdiction to decide upon the objections now raised.

Certain qualities are required in all interrogatories, as in all questions proposed to witnesses not adverse, viz., that they shall not be "leading." And the practice at common law prescribes that "in the preparation of interrogatories, care should be taken that the questions are not leading ones, or in any way objectionable; otherwise it seems they and their answers may be struck out at the trial:" 1 *Chitty's Archbold Pr.* (13th ed.) 304.

The earlier practice in Chancery was, that if either party, after the depositions were given out, objected to

the interrogatories as leading, an order, on a petition of course, issued, referring it to the Master to consider the objections. If the Master found against the interrogatories, then, on the confirmation of his certificate, an order of course issued for expunging the objectionable interrogatories and suppressing the depositions taken thereon: 1 *Grant's Ch. Pr.* 239; 1 *Daniel's Ch. Pr.* (2nd ed.) 935.

This practice applied to interrogatories in the cause. But under the modern practice, where the chief clerk, under the direction of the Judge, takes the examination of a party or witness upon interrogatories, such interrogatories are prepared by the party on whose behalf the examination is to be taken, and are settled and approved by the chief clerk, who attests his approval by his signature to a memorandum of allowance in the margin thereof: 2 *Daniel's Ch. Pr.* (1871) 1061.

It may be that such practice is applicable here; but it is not necessary to consider that point on this application. By C. S. U. C. ch. 12, sec. 9, the Master was liable to perform the duties "usually performed by the like officer in England," a provision which was continued in force in Ontario until slightly varied by R. S. O. ch. 40, sec. 8.

Taking a few of the proposed interrogatories as samples, I think they partake of the quality of "leading questions." For instance, the defendant proposes to ask himself: "Was the sum of \$58.88 paid by you for taxes on lot N. on the date mentioned in the account, namely, 1st October, 1877?" "Were the sums, namely, \$34.21, \$59.46 [and nine other sums] referred to in the said account, paid by you?" "Look at the Schedule C to the affidavit, being sums lent to Lockwood, and state whether or not the sums by you therein mentioned were advanced to the plaintiff Lockwood?"

If the examination under the present commission was to be *vivâ voce*, I apprehend that the Commissioner would be bound, as I would were the examination before myself, to rule that the counsel for this defendant could not examine his client in his own behalf by these and similar "leading

questions." And I see nothing in the practice which suspends my jurisdiction to rule against such leading questions until the mischief is done, and the answers to the irregular questions are returned to this office. The modern policy of the Courts is not to encourage a practice which would permit a party to lay by while his opponent is taking an irregular proceeding, and then after the proceeding is completed, move against it as irregular. A party complaining of an irregularity must move promptly, or he may be held to have waived the irregularity. Irregularities in notices of trial are now moved against before instead of waiting until after the trial, and then moving against the verdict. The non-service of the statutory jury notice in an interpleader issue has been held to be waived by not moving against it until after the trial: *Leeson v. Lemon*, 9 P. R. 103.

The taking of evidence either under a commission like this, or at an ordinary hearing in the Master's office, is a proceeding under the reference before me; and under the General Orders the Master has power on the hearing and determining of the reference, "to regulate in all other respects the manner of proceeding with such reference." It is usual in respect to irregular accounts, irregular services, irregular abstracts of title, irregular examinations, and other irregular proceedings in the Master's office to require parties to object promptly, and if so advised to object before the day on which the irregular proceedings would be consummated or returnable; and I can therefore see no valid reason for the suspension of the Master's jurisdiction in the case of irregular interrogatories until after the interrogatories are answered and the case is ripe for adjudication. No judicial officer can do otherwise than hold that "leading" interrogatories are irregular; and in my judgment it would be a most unwise course, in a case like the present, to say: "true these proposed interrogatories are irregular, but the jurisdiction to declare them so is suspended, or will not arise, until both parties have incurred the expense and delay of having them

proposed and answered: then when the parties come before me I shall hold them to be irregular, and direct the proceedings to be commenced *de novo*."

Until I am told by higher authority that the practice requires me thus to rule, I must exercise the jurisdiction now invoked, and strike out the interrogatories which are objected to as "leading."

There is nothing in the O. J. A. or rules affecting the jurisdiction of the Master in the matters I have referred to; and in *Fisher v. Owen*, 8 Ch. D. 645, the Master of the Rolls held that the former practice of the Court of Chancery in respect of interrogatories had not been interfered with by the Judicature Act or the rules.

The order made by the Master was that the second and third interrogatories and part of the first be struck out.

From this order the defendant appealed to a Judge in Chambers, and the plaintiff also brought on a cross-appeal for the purpose of having the remainder of the first interrogatory and parts of the sixth and eighth interrogatories struck out.

*Holman*, for the appeal.

*Foy*, Q.C., contra.

PROUDFOOT, J.—The rules as to evidence at the trial cannot be applied under the circumstances here. It will involve endless delay in the Master's office if a party to the suit who has made an affidavit is not to be asked: "Is the account in the schedule to your affidavit correct?"—thus leaving it to the other side to cross-examine, instead of beating about the bush as to each particular item, in order to avoid leading questions.

Defendant's appeal allowed.

Plaintiff's appeal dismissed.

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LOCOMOTIVE ENGINE COMPANY V. COPELAND ET AL.

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In the report of this case, (*ante* p. 572) it is stated that two of the defendants had absconded. The defendants' solicitors desire to have it noted that their clients, who are now resident in Chicago, did not abscond.





# A DIGEST

OF

## ALL THE REPORTED PRACTICE CASES

CONTAINED IN THIS VOLUME.

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### ABSCONDING DEBTORS' ACT.

1. *Absconding Debtors' Act—Priorities of creditors.*—On the 25th of January, 1884, seven warrants of attachment at the instance of different plaintiffs were issued out of a Division Court against the goods of the defendant, an absconding debtor, and under them the bailiff seized certain goods. Subsequently and on the same day a writ of attachment was issued by the plaintiff in this suit against the defendant as an absconding debtor, and the goods seized by the bailiff were delivered up by him to the sheriff pursuant to sec. 16 of the Absconding Debtors' Act. Five other Division Court attachments and one County Court attachment were afterwards issued. Judgments were recovered by all the attaching creditors; executions were issued in the suits in the Superior and County Courts; and the clerk of the Division Court furnished the sheriff with a certified memorandum of the judgments in that Court, by virtue of which each creditor mentioned in it was entitled for the purpose of sharing in the proceeds to be treated as a plaintiff who had obtained judgment and sued out execution. Pending this suit an order was made for the

sale of the goods attached under the writ, and the goods were sold, and the proceeds of the sale paid into Court.

Upon a motion for distribution of the moneys in Court the plaintiffs claimed payment of their costs of suit in priority to all other claims. It was ordered that the costs of issuing the plaintiffs' writ, and the fees and charges paid to the sheriff for executing it should be paid first out of the fund, because these costs and charges were necessarily incurred in seizing, recovering, and preserving the property, and that any fees which had been incurred in the Division Court in issuing the warrants of attachment on the 25th January, and seizing the property and holding it till it was delivered to the sheriff should also be paid out of the fund, and also the costs of the order directing the sheriff to sell, and the costs of this application, and that after payment of these charges the fund should be distributed ratably among the creditors. *Darling et al. v. Smith*, 360.

2. *Absconding Debtors' Act, R. S. O., ch. 68.*—Goods were sold to the defendant by the plaintiffs upon a five months' credit, and he refused to accept a bill of exchange at five

months for their price. The plaintiffs before the expiration of the five months, issued a writ of attachment against the defendant under the Absconding Debtors' Act, R. S. O. ch. 68, on an affidavit that defendant was indebted to them for goods sold and delivered.

*Held*, that to bring a case within the statute, there must be a debt due and payable at the time of the issuing of the writ, and that in this case there was no such debt as sworn to. The attachment was therefore set aside.

*Semble*, that in proceedings of this kind the existence of the debt itself may be enquired into. *Kyle et al. v. Barnes*, 20.

See ABSCONDING DEBTOR.

### ABSCONDING DEBTOR.

*Jurisdiction of Master in Chambers — Absconding Debtors' Act.*—After judgment has been entered against an absconding debtor pursuant to the finding of a County Court Judge on a reference under R. S. O. ch. 68, sec. 9, the Master in Chambers has no jurisdiction to set aside the judgment at the instance of another creditor who wishes to be let in to defend. *Wills v. Carroll*, 142.

See WRIT OF ATTACHMENT.

### ACTION.

*Staying proceedings in action — Costs of former proceeding.*—In 1879, the Grand Junction Railway obtained from the Court of Queen's Bench a rule for a mandamus to enforce the delivery of bonds by the

defendants to the amount of \$75,000, pursuant to a by-law of the defendants to aid in the construction of the plaintiffs' road. On appeal to the Court of Appeal this rule was discharged, and on appeal to the Supreme Court of Canada, the Court of Appeal's judgment was affirmed, with costs against the plaintiffs. Since then the road has been completed, but the costs of the above proceedings have not been paid. This present action is brought in the name of the Grand Junction Railway and the Midland Railway to recover the aforesaid sum of \$75,000 in money.

Upon motion to stay all proceedings in this action till the costs of the former proceedings shall have been paid:

*Held*, notwithstanding that new circumstances having arisen, and the proceeding not being the same as the first proceeding nor grounded upon exactly the same facts, and notwithstanding that the Midland Railway Company are now joined as plaintiffs, the attempt to proceed in this action without first paying the costs of the former action is vexatious, and the order asked for must be made: following *Cobbett v. Warner*, L. R. 2 Q. B. 108. *Grand Junction Railway v. County of Peterborough*, 107.

See SOLICITOR AND CLIENT.

### ADMINISTRATION.

1. *Administration suit — Jurisdiction of Master.*—In proceeding to take the accounts under an ordinary Chamber administration, order certain unsecured creditors and the administrator sought to impeach the validity of certain warehouse receipts assigned to the plaintiffs by the tes-

tator in his lifetime, and on which he had received advances.

On appeal from the Master's ruling, it was held by BOYD, C., that as the Court takes possession of the estate for the purpose of administration, the Master's office possesses all the powers requisite for the administration of the assets, and had therefore jurisdiction to try the question. And that in the case of a creditor's administration reference, any creditor had a right to resist or attack the claims of any other creditor sought to be proved in the Master's office. *Merchants' Bank v. Monteith*, 458.

2. *Administration limited—Foreign testator—G. O. Chy.* 638.]—Where a testator dies out of the jurisdiction of the Court an administration order will not be granted, unless it is clearly shewn that there are no personal assets here in respect of which ancillary letters probate could be obtained.

An administration of the real estate only may be had in a very special case, but should be sought by action and not summary application. *Re Armour—Moore v. Armour*, 448.

3. *Administration suit—Reference—Change of place of—Conduct of*]—An appeal from the order of the Master-in-Chambers changing the place of reference in an administration suit from Brantford to Walkerton, and giving the conduct of the reference to the defendants, the executors, instead of the plaintiff, was dismissed with costs.

*Held*, that the reference in administration actions should *prima facie* be to the place where the person whose estate is to be administered resides. *G. O. Chy.* 638, governs the case, and the practice laid down in

*Macara v. Gwynne*, 3 Gr. 310, is inapplicable.

During the argument before the Master, and on the appeal the solicitor for certain of the defendants other than the executors asked for the conduct of the reference in the event of its being taken from the plaintiffs.

*Held*, that the solicitor could not obtain the conduct of the reference unless by a substantive application.

The appeal was dismissed, without prejudice to a substantive application. *Thompson v. Fairbairn*, 533.

4. *Estoppel—Administrator bound by fraud of intestate—Executor de son tort.*]—The letters of administration to an infant as administrator were revoked after judgment against him in an action brought by him to recover certain assets of the estate, and new letters were granted to one P., who thereupon obtained an order of revivor in such action, directing the further proceedings to be carried on by P. as administrator and plaintiff. Before P. could move against the judgment the order of revivor was rescinded. P. in this administration action attacked the validity of the securities which the former administrator had impeached in the action referred to, whereupon the plaintiffs (who had been defendants in that action) applied to have it ruled that the judgment in such other action was *res judicata* against P. in this administration proceeding.

*Held*, that by the discharge of the order of revivor in the action, in which the plaintiff by revivor was suing in *autre droit*, such action was left without a plaintiff, and the judgment recovered was not under the circumstances an estoppel against P.



Where certain creditors and the administrator were parties to an order in Chambers compromising an action respecting certain assets of the estate.

*Held*, that they were bound by such compromise, and could not impeach in this administration proceeding the validity of securities which had been in question in the action compromised.

An executor or administrator is estopped by the fraud or criminal acts of the deceased person he represents from seeking to invalidate securities tainted by such fraud or criminal acts, which such deceased person had given to his creditors during his lifetime.

The party who sells or gives the goods of a deceased person to another, but not the purchaser or receiver, is subject to the liability of an executor *de son tort*.

The rule that where an executor takes the testator's goods on a claim of property in them himself, although it afterwards appear he had no right, such claim being expressive of a different purpose from that of administration as executor, is also applicable to the case of a person taking the goods of a deceased person under a fair claim of title, such person, though he may not be able to establish his claim of title completely in every respect, is not liable to be charged as an executor *de son tort*. *Merchants' Bank v. Monteith*, 467.

5. *Administration order — Preliminary issue — Jurisdiction of Master — Setting aside will — Personal representative — Executor's liability for chattels given for life and then to remainder-man.*]—The jurisdiction in Chambers to grant administration orders, applies only to simple cases of

accounts, and the Judge or Master in Chambers, may take the administration accounts in Chambers without referring them to the Master's office. But to all such references Chancery Order 220 applies.

Where on an application for such order, it appears that there is a substantial and preliminary question to be decided, such question should be decided before the reference is ordered; and the Court may limit a time within which the parties may try the issue. But if the issue is not tried, or the order is made in Chambers without first directing such issue, the parties are held to have waived such preliminary question, and cannot raise it in taking the accounts under such order in the Master's Office.

The jurisdiction of the Master's Office is not co-extensive with that of the Court in enquiring into and adjudicating upon the validity of documents; and there is no authority to support any implied or assumed delegation of the functions of the Court to the Master. Nor is there any practice in the Master's Office which allows parties to obtain a reference to the Master so as to evade the ordinary judicial functions of the Court, and then invoke those judicial functions in a tribunal of delegated and subordinate jurisdiction.

The plaintiffs when taking accounts before the Master under the ordinary Chamber order for the administration of personal estate, sought to have it declared that a bequest to R. who was one of the witnesses to the will, was valid.

*Held*, 1. That the Master had no jurisdiction under such order and on oral pleadings to adjudicate upon the validity of the will; 2. That even if there was such jurisdiction, it



could not be exercised in the absence of a personal representative of R.'s estate.

*Quære*, whether since *Ryan v. Devereux*, 16 U. C. R. 100, such a bequest would be held to be invalid.

Where a will creates a life estate in chattels, the executor is discharged when he hands over such chattels to the tenant for life. The tenant for life, and not the executor, then becomes liable for them to the person entitled in remainder. *In Re Munzie*, 98.

See COMMISSION—CORPORATIONS, 2  
—SECURITY FOR COSTS, 6—SET-OFF.

## ADMINISTRATOR.

See HUSBAND AND WIFE, 4—  
INFANT.

## AFFIDAVIT ON PRODUCTION.

*Affidavit on production—Examination of parties—Chy. G. O. 268.—Rules 226 and 283, O. J. A.]—Chy. G. O. 268 has been superseded by Rule 283, O. J. A.*

A party to an action cannot now be examined upon his affidavit on production, with this exception, that by Rule 226, O. J. A., an officer of a corporation may be so examined. *Frith v. Ryan*, 235.

## ALIMONY.

1. *Alimony—Costs—32 Vic. (O.) ch. 18, sec. 2.]—*An application to compel the defendant to pay the costs of the plaintiff's solicitors of an action for alimony.

The action was settled before trial, the plaintiff returning to live with the defendant, and the defendant agreeing to pay the plaintiff's solicitors' costs.

*Held*, that before the Act 32 Vic. (O.) ch. 18, (R. S. O. ch. 40, sec. 48,) the defendant would have been liable to pay costs.

*Held*, under the wording of section 2 of the above Act, that the plaintiff had not failed to obtain a decree for alimony, and that the defendant is therefore liable to pay costs. *Moore v. Moore*, 284.

2. *Alimony suit—Order on defendant to pay plaintiff's witness and counsel fees. Bradley v. Bradley*, 571.

3. *Alimony suit—Counsel fee.]—*An order was made in an alimony suit, directing the defendant to pay to the plaintiff, before the hearing of an appeal, a sum of \$40, for the purpose of paying the wife's counsel fees notwithstanding that the solicitor for the plaintiff would be her counsel on the appeal.

*Quære*, whether owing to the altered status of married women, the reason for such payment has not ceased. *Magurn v. Magurn*, 570.

4. *Alimony suit—Plaintiff's disbursements—Counsel fee.]—*An order was made in an alimony suit for the payment to the plaintiff, before the trial, of \$22.35, on account of her disbursements for witness fees, and of \$40 on account of counsel fee.

*Quære*, whether the counsel fee should be paid in advance if the plaintiff's solicitor acts as counsel. *Ingram v. Ingram*, 569.

See COSTS, 6—INTERIM ALIMONY.

## ALLOCATUR.

See CORPORATIONS, 2.

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## ALLOTMENT.

See CORPORATIONS, 5.

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## AMENDMENT.

See TRIAL, 2—VENDOR AND PURCHASER, 2.

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## ANNUITY.

See WILL, 1.

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## APPEAL.

1. *Appeal—Report—Time—Christmas vacation.*—The term “vacation” in G. O. Chy. 642, means Christmas as well as Long Vacation, and hence the former is not to be counted in the time within which an appeal from a Master’s Report may be had under that order.

Notice of appeal from a report dated 29th November, 1883, given on the 31st December, 1883, for the 7th January 1884, is valid. *Blake v. Building and Loan Association*, 153.

2. *Notice of appeal—Computation of time.*—A notice served on Monday October 6th, of an appeal to the Court of Appeal from a judgment given on the 4th of September, was held too late. *Wright v. Leys*, 354.

3. *Appeal—Notice—Extending time—Sec. 38 O. J. A.*—A plaintiff was advised by his solicitor on the

3rd of July of the judgment of the Court given on the 30th of June. He did not see his solicitor again until the 20th of August, when he, for the first time, learned that he should have caused notice of appeal to be served within a month from the rendering of the judgment. (Sec. 38 O. J. A.)

*Held*, not a sufficient ground for giving leave to appeal, and thus denying to the party who had obtained the judgment of the Court the right to have it enforced as promptly as the rules and practice of the Court will permit.

*Held*, also, that the fact that the plaintiff might be prejudiced in another action against another party in another division of the High Court of Justice, by this judgment, was not a ground for granting the indulgence sought. *Wilby v. Standard Fire Insurance Company*, 34.

See COSTS, 8, 12—GARNISHEE—REHEARING—REPORT—SHERIFF, 2—STAY OF PROCEEDINGS—TAXATION—THIRD PARTY.

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## APPEAL BOOK.

See COSTS, 11—JUDGMENT, 1,

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## APPEARANCE.

*Appearance entered gratis — Lis pendens.*—The plaintiff issued a writ of summons, and registered a certificate of his *lis pendens* upon the lands of the defendant Toothe. The defendant not having been promptly served with the writ, and being anxious to get rid of the suit entered an appearance *gratis*.

The Master at London made an

order in Chambers upon an application of the plaintiff striking out the appearance.

*Held*, upon appeal, that there is nothing in the Judicature Act or rules which interferes with the well-recognized practice that a defendant has a right to appear voluntarily, and to anticipate the service of actually issued process. Especially should his privilege to appear *gratis* be preserved in a case where his property is directly and prejudicially affected by the commencement of the action and the registration of its pendency.

Appeal allowed, with costs in the cause to the defendant in any event. *McTaggart v. Toothe et al.*, 261.

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## APPOINTMENT.

*See* EXAMINATION, 2.

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## ARREST.

*Domicile — Fraudulent flight to avoid arrest.*]—It is of no consequence where the domicile of a person may be, or to what country he is bound by allegiance as a subject or citizen, if he comes to this Province, and reside here, and contract debts, and is about to quit the country (that is in fact to change his residence to a foreign country, even though that country be his place of domicile) with the intent to defraud his creditors, he is subject to arrest as it prevails in this Province.

*Held*, that a defendant cannot rely on a change of residence to a foreign country so as to avoid the law of arrest, to which he was subject in this Province at the time he incurred the debt upon which the action is

brought, when that change of residence has been effected by a fraudulent flight to avoid arrest. *Kersterman v. McLellan*, 122.

*See* VAGRANT ACT.

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## ATTACHMENT.

*Attachment of debts—Money due under contract.*]—McLeod contracted with Hawkins to erect a house, for which he was to receive \$1,225; \$300 when the frame was up, \$300 when the building was wholly enclosed, and the balance when the work was all completed. The building was to be completed on or before the 3rd of February, 1884.

McLeod went on with the work and received the two sums of \$300 but he had not completed the building on the 3rd of February, 1884. He, however, continued the work till after that time, and until after the 1st of April, when the building being still unfinished, Hawkins entered, took possession, and completed it.

McCraney & Son, having a judgment against McLeod, obtained and served an attaching order and garnishing summons on Hawkins, the garnishee, on the 15th of March, 1884.

*Held*, that at the time of serving the attaching order no debt existed according to the terms of the contract, and no promise to pay had arisen by implication, and therefore there was nothing upon which the attaching order could operate. *McCraney et al. v. McLeod et al.*, 539.

*See* MANDAMUS—WRIT OF ATTACHMENT.

## BETTING.

*Stakeholder—Bet—40 Vic. ch. 31, D.]*  
 —The Act 40Vic. (D) ch. 31, intituled an Act for the repression of betting and pool selling, does not forbid betting, and does not apply to stakeholders in any of the three cases mentioned in sec. 2. *Regina v. Dillon*, 352.

## BILL OF COSTS.

1. *Bill of Costs—Delivery and taxation—Præcipe order.*]—Upon a motion in Chambers for an order for the delivery and taxation of a solicitor's bill of costs relating to certain proceedings under mortgage.

*Held*, that the Chancery practice of obtaining such orders on *præcipe* is the more convenient one, and should prevail in all divisions of the High Court of Justice.

Order made with costs as of a *præcipe* order. *Re Fitzgerald, a Solicitor*, 279.

3. *Taxation—Solicitor's bill of costs—Payment—Special circumstances.*]—After payment of a bill of costs, the Court will not disturb it on the ground of overcharge unless it appears to be a case of gross and exorbitant overcharge amounting to fraud. But before payment it is enough if the items are unusual or more than ordinarily large so as to require justification, and if no explanation is furnished by the solicitor, upon whom the onus to do so rests, then taxation will be ordered.

The following circumstances were held not to be special circumstances which would entitle the client to tax his solicitor's bills after a year from their delivery, because these circumstances could be as well considered

at the trial of the action as on a reference to a taxing officer.

(1.) That the bills sued on contained certain items included in other bills paid by the client; (2) That some work was charged for which never was done; (3) That a payment of \$200 on account by the client was disputed.

*Held*, however, that the conjunction of the following circumstances, viz.: (1) That the relationship of solicitor and client was continued after delivery of the bills; (2) That there was an offer by the solicitor to make a substantial deduction from the bills sued on, and (3) that there were items of apparent overcharge as to which no explanation was offered by the solicitor, would justify an order for taxation. *Re Walker—Walker v. Rochester*, 400.

3. *Costs—Action by solicitor against client—Reference to taxation—Rule 443 O. J. A.*]—*Held*, that by the Ontario Judicature Act, the former practice has been changed, and an order referring a bill of costs to a taxing officer, should not direct the officer to do more than ascertain the proper amount of it. *Macdonald v. Piper*, 586.

See CORPORATIONS, 2—COSTS, 10.

## BREACH OF PROMISE OF MARRIAGE.

See EXAMINATION, 3.

## BRIBERY.

See ELECTION, 1.



## BY-LAW.

*By-law—Conviction—Proviso and Exception — Recognizance — Certiorari.*—47 Vic. (O.) ch. 32, sec. 13, sub-sec. 12. enacts that by-laws may be passed “for regulating or preventing the ringing of bells, blowing of horns, shouting, and other unusual noises, or noises calculated to disturb the inhabitants,” &c.

Section 2 of by-law No. 179 of the City of London, passed under that Act is as follows: “No person shall, in any of the streets, or in the market place of the City of London, blow any horn, ring any bell, beat any drum, play any flute, pipe, or other musical instrument, or shout or make, or assist in making, any unusual noise, or noise calculated to disturb the inhabitants of the said City.”

“Provided always, that nothing herein contained shall prevent the playing of musical instruments by any military band of Her Majesty’s regular army, or any branch thereof, or of any militia corps lawfully organized under the laws of Canada.”

The prisoner was convicted under the by-law of beating a drum on a public street in the City of London.

*Held*, that the by-law so far as it sought to prohibit the beating of drums simply, without evidence of the noise being unusual, or calculated to disturb was *ultra vires*, and invalid, and that the refusal to receive evidence on the prisoner’s behalf was a valid ground for her discharge.

*Held*, also, that the above proviso was not an exception that must be negatived in either the commitment or conviction.

*Held*, also, that on the return of a writ of *certiorari* a recognizance is unnecessary. *Regina v. Nunn*, 395.

## CAUSE OF ACTION.

1 *Cause of action—Breach of contract—Jurisdiction—Rules 45-8 O. J. A.—Undertaking of solicitor to prove cause of action within jurisdiction.*—In an action for damages for breach of contract by the defendants, a corporation in Liverpool, England, in not delivering certain machinery at the railway station nearest to Ottawa, the writ and statement of claim were served on the defendants’ agent in Montreal, and under Rule 48 O. J. A. the plaintiff now applied for an order allowing the service, on the ground that the case was one within Rule 45. The affidavit made and filed by the plaintiff’s solicitor set out.

“2. The paper writing shown to me, marked Exhibit A, is a true copy of the statement of claim delivered in this action;

“3. This action is brought to recover damages for breach of contract on the part of the defendants in not delivering the machinery, in the statement of claim mentioned, at the railway station nearest to Ottawa under the terms of the contract.”

But the affidavit did not state that the deponent knew the fact, either of his own knowledge or on information and belief, nor that the defendants ever entered into a contract with the plaintiff, and undertook to deliver the machinery at the railway station nearest to Ottawa.

The bill of lading containing the contract in question provided *inter alia* “that the machinery in question is to be delivered at the port of Montreal unto the G. T. R. Co., by them to be forwarded upon the conditions above and hereinafter expressed, thence per railway to the station nearest to Ottawa, and at the aforesaid station delivered to order



\* \* freight \* \* to be paid by the consignees." "That the goods are to be delivered from the ship's deck, when the shipowner's responsibility shall cease. Through goods sent forward by rail are deliverable at the railway station nearest to the place named hereafter." "That any loss, damage, or detention of goods on this through bill of lading for which the carrier is liable must be claimed against the party only in whose possession the goods were when the loss, damage, or detention occurred."

*Held*.—1. That the affidavit did not afford the proof required under Rule 48: 2. That the bill of lading showed no contract on the part of the defendants to deliver at Ottawa, or the nearest station to Ottawa; nor any contract, the breach of which was made in Ontario, because, if there was such a contract in the bill, force and effect could not be given to the stipulations in it that the shipowner's responsibility should cease when the goods were delivered from the ship's deck, &c., and hence, though leave would be given to file further affidavits, such leave was therefore unnecessary.

And, again, if there was a contract, and its terms expressly exempted the defendants from any and all liability for damage, for any loss, &c., arising beyond their line, no damage for a breach in this province would result to the plaintiff, and though technically within Rule 45, sub-sec. c., discretion should (if any exist) be exercised in refusing to allow the service.

In cases of this kind an order allowing service should not be made on an undertaking of the plaintiff's solicitor to prove a cause of action, &c., within the jurisdiction, as it shifts the onus of proof to the plaintiff, and requires him to conduct, it

may be, a long and expensive litigation to procure a decision on a point properly raised at the commencement of the action, *Perkins v. Mississippi and Dominion Steamship Company (Limited)*, 198.

2. *Prohibition—Division Court—Cause of action*—43 Vic. ch. 8, s. 8-12, (O.)—A promissory note was dated at Milton, in the county of Halton, 17th September, 1877, and was for \$100, payable three months after date at Milton, with interest at eight per cent. per annum. The amount claimed was \$149.50.

The maker died in the county of Essex, long after the maturity of the note; her will was proved in Essex; and the defendants, at the time of the action resided in that county.

The plaintiff having sued upon the note in a Division Court of the county of Halton: *Held*, that the death of the maker, the circumstances of her making a will appointing the defendants executors, and the proving of the will by the executors, were no part of the cause of action, which was complete before the grant of the probate:

*Held*, also that the Division Court of Halton, which was sought to be prohibited, had jurisdiction by virtue of 43 Vic. ch. 8, secs. 8, 12 (O.) *Re McCallum v. Gracey*, 514.

*See* PROHIBITION.

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## CERTIFICATE FOR COSTS.

*See* COSTS 3, 7.

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## CERTIFICATE OF TAXATION

*See* TAXATION.

## CERTIORARI.

*Certiorari*—*Right of defendant to*—32 & 33 Vic. ch. 31, sec. 71, (D.) and 33 Vic. ch. 27, sec. 2, (D.)—The defendants having been convicted by a Police Magistrate of an offence against the provisions of C. S. C. ch. 95, appealed to the Quarter Sessions, and the convictions were affirmed.

Defendants now applied for a *certiorari* to remove the convictions, notwithstanding that 32 & 33 Vic. ch. 31, sec. 71, (D), as amended by 33 Vic. ch. 27, sec. 2, (D.), expressly takes away the right to *certiorari* where there has been an appeal to the Sessions.

*Held*, that where the magistrate has jurisdiction over the offence charged, and the right to *certiorari* is taken away, the Court cannot examine the evidence to see if the magistrate had jurisdiction to convict, and the *certiorari* was refused. *Regina v. Scott et al.*, 517.

See BY-LAW.

## COLLATERAL SECURITY.

See MORTGAGE, 1.

## CONVICTION.

See BY-LAW—VAGRANT ACT.

## COMMISSION.

*Administration*—*Solicitor's commission under G. O. Chy. 643.*—In an administration suit in which the estate was insolvent, the total assets being \$72,000, the liabilities \$138,475, and the creditors 180 in num-

ber, and in which the commission of the solicitor who acted for all parties was allowed by the Master, under G. O. Chy. 643, at \$995, eight creditors, at the close of the suit, and without notice to the solicitor until fourteen days before moving, applied for an order for the delivery and taxation of the solicitor's bill instead of the allowance of the commission, on the ground that the commission was excessive.

*Held*, that the commission was not so exorbitant as to warrant the substitution of a taxed bill, and a probable reduction by that mode of payment, especially as the benefit to the creditors would be trifling,

The scope of the G. O. Chy 643, is merely to aid in fixing a solicitor's remuneration. It is not intended to do strict justice, but is only a sort of convenient expedient for fixing costs without taxation.

A very liberal compensation in such cases is not *per se* a reason for reducing the commission, or directing the taxation of a bill in its stead, nor *per contra* is a low or inadequate compensation a reason for increasing the commission, or directing payment by a taxed bill.

*Semble*, that, in cases affected by this order, any party interested in the estate, who may desire that a solicitor should be paid in the particular matter or suit on the scale of a taxed bill instead of by commission, should give notice to the solicitor to that effect, and have the Master note it in his book, at the earliest stage possible in the proceedings, but there is no practice authorizing the substitution of a bill of costs for commission at the option of any party. *In re Stuebing, Anthes v. Dewar*, 236.

See FOREIGN COMMISSION.

## CONDITIONS OF SALE.

See VENDOR AND PURCHASER, 1.

## CONTRIBUTION.

See THIRD PARTY.

## CORPORATIONS.

1. *Insurance — Provincial incorporation — British North America Act—Foreign contract—Lex loci contractus*—A company incorporated by a Provincial Legislature for the business of insurance, possesses the same capacity and franchises within the jurisdiction creating it as a company incorporated by the Imperial or Dominion Parliaments; and may enter into contracts outside the Province wherever such contracts are recognized by comity or otherwise.

The term "Provincial objects" in the British North America Act refers to local objects within a Province, in contradistinction to objects which are common to all Provinces in their collective or Dominion quality.

The legislative enactments of a country have no binding force *proprio vigore* in another country, and a Legislature cannot authorize corporations created by it to carry on business in a foreign country. Where, however, a Legislature assumes so to do, such authority is only a legislative sanction to the agreement of the incorporators to transact their business abroad as well as at home.

The locality of the forum of litigation determines whether a corporation is foreign or not. A contract executed in Ontario, and delivered by the agent of the contractor to the

contractee in New York, is governed by the law of Ontario.

So a contract signed and sealed in blank at a head office of a company in Ontario, and sent to the company's agent in New York to be filled up and delivered to the contractee there, is a contract made in Ontario by relation to the act of signing and sealing such contract at such head office.

Where no place of payment of a policy of insurance is mentioned in the policy it must be assumed that the place of payment is where the head office of the insurance company is situated, and this fact may determine the question of the *lex loci contractus*. *Clarke v. Union Fire Insurance Company*, 313.

2. In proceeding on a judgment for winding up a company, the former solicitor of the company brought in a claim for bills of costs alleged to be due him, which the former Master referred to one of the Taxing Officers to tax.

*Held*, that the Master had authority to direct such reference.

On such a reference the Taxing Officer gives his opinion as to whether the fees and charges claimed should be allowed or disallowed, and on that opinion the Master makes his adjudication.

The Taxing Officer has a discretion as to the attendance of parties claiming a right to attend on such taxation, and his discretion will not be lightly interfered with.

The Taxing Officer's allocatur is sufficient proof that the business charged for was done by the solicitor.

The rule requiring special circumstances to warrant the re-opening or taxation of a bill of costs after twelve months, does not apply where the bill has been delivered after a com-



pany has been ordered to be wound up

The General Manager of a company had authority to do acts which occasionally required legal advice :

*Held*, that he had implied authority to retain a solicitor whenever in his judgment it was prudent to do so, but that such authority ceased on the suspension of the company.

Where the directors of a company had power to appoint officers and agents and dismiss them at pleasure :

*Held*, that their appointment of a solicitor need not be under the corporate seal.

Where a solicitor had instructions to defend a suit, which was discontinued and a new one for the same cause of action was commenced :

*Held*, that the original retainer to defend continued in the new suit.

A solicitor for a company is entitled to charge such company for special work and journeys undertaken at the request of individual directors and the general manager.

In proceeding under a judgment for the winding-up of a company, the Master has the same jurisdiction to try claims for unliquidated damages arising out of breach of contract as he would have in an administration proceeding.

Where a conditional agreement to take shares in a company is broken the shareholder is freed from liability on such shares.

But where the agreement is collateral the shareholder is liable on such shares, but has a right of action for indemnity or damages against such company.

The Court will not allow its administration of assets to be interfered with by other proceedings, affecting the estate ; and creditors of such estate bring their rights with them into the Master's Office, which the

Court substitutes for proceedings at law. *Clarke v. Union Fire Ins. Co.—Caston's Case*, 339.

3. *Winding-up order*—45 Vic. ch. 23(D)—*Carriage in Master's Office—Jurisdiction of Master in Chambers.*]

—It is preferable to have the proceedings under an order for winding-up a company under 45 Vic. ch. 23 (D), conducted by solicitors who are totally unconnected with the company to be wound up.

It is not competent for the Master in Chambers to make an order under section 77 of the Act as amended by 47 Vic. ch. 39, sec. 5 (D), referring the winding-up to the Master in Ordinary. That may be done by a Judge, as in conformity with the usual course of proceedings in other causes and matters, but it is not the practice, save in one or two exceptional cases, to have references ordered by the Master in Chambers to the Master in Ordinary. The intention of the Act is, that the Master in Chambers, or Local Master, or Master in Ordinary may grant a winding-up order, and conduct all the proceedings necessary therefor in his own office and before himself as a judicial officer.

Under the facts stated in the report, an order having been obtained in Chambers by one creditor for winding-up a company the conduct of the proceedings was given to three creditors who had also applied for such order. *Re Joseph Hall Manufacturing Company*, 485.

4 *Sale by liquidator of assets of a company—Agreement to buy at unascertained rate—Ambiguous contract—Sales under Dominion Insolvent Companies Acts.*]

--The liquidator of an insolvent company brought in for approval an agreement with certain

parties for the sale to them of its assets at a price equal to twenty-five cents on the dollar of the claims of the creditors of the company, "as may be admitted or adjudicated," in addition to the costs of the liquidation proceedings to be taxed by the Taxing Officer, and the remuneration of the liquidator to be settled by the Master. There was no mode of admitting or adjudicating on such claims provided in the agreement. The agreement was opposed by certain creditors, and thereupon the proposed purchasers withdrew from it.

*Held*, (1.) That if the creditors' claims were to be admitted by and between the parties the agreement was conditional, and the purchasers by withdrawing before ascertainment left the agreement imperfect.

(2.) That by not providing a mode of admitting or adjudicating upon the creditors' claims the agreement was ambiguous, and parol evidence would have to be adduced to explain it.

(3.) That for these reasons the agreement was incapable of being enforced, and could not be approved.

*Quære*, whether an agreement to purchase the assets of a company at a certain rate in the one dollar of the unascertained claims of the creditors of such company would be valid.

The Chancery practice in sale cases applies to the sales under the Dominion Insolvent Companies Act; and under such practice it is usual before offering property for sale to have an inquiry whether a sale by auction, or under private contract, would be the most advantageous to the estate. When a sale by private contract is directed, an affidavit of the actual value of the property should be produced, so that such value may be compared with the price offered. *Re Bolt and Iron Company*, 437.

5. *Winding-up insolvent company — Allotment of stock — Proceedings against contributory — Costs — Delegation of powers*]—Under an order for winding up an insolvent company, under 45 Vic. ch. 23, (D.), the proceedings to enforce the liability of shareholders must be taken by the liquidator, and not by the petitioner for the winding-up order.

When proceedings are so taken by the liquidator, and are unsuccessful, costs may be awarded against him personally, leaving him to apply to be allowed such costs out of the assets of the company.

A contract between a company and a person who makes application for shares must be dealt with as ordinary contracts; there must be an offer by the one to take shares, and an acceptance of such offer by the company.

One H. subscribed for shares in a company, but no shares were formally allotted to him by the directors. Calls were made by the general manager, and notices of such calls were sent by the secretary to and received by H., but the calls had never been authorized by the directors.

*Held*, that the unauthorized acts of the officers named could not be construed to be an allotment, or a notification of an allotment of stock, so as to bind the company or prove an acceptance of H.'s subscription for stock.

A board of directors cannot delegate to its officers or to third parties its statutory powers to allot stock, or make calls. *Re Bolt and Iron Company—Hovenden's Case*, 434.

6. *Winding-up—Insolvent company—Reference to Master-in-Ordinary—Jurisdiction of judicial officers named in 47 Vic. (D.) ch. 37—Dele-*



*gation of judicial powers—References under O. J. A.]—*The Dominion Insolvent Companies Act, 45 Vic. ch. 23, as amended by 47 Vic. ch. 39, authorizes the Master in Chambers, the Master in-Ordinary, or any Local Master or Referee to exercise the powers conferred upon the Court in Ontario for the purpose of winding up insolvent companies. The Master in Chambers, as one of the judicial officers named in the Act, made an order for the winding-up of an insolvent company, and referred it to the Master-in-Ordinary to settle the list of contributories, take all necessary accounts, make all necessary inquiries and reports, and generally to do all necessary acts, matters, and things for the winding-up of the business of the said company.

*Held*, (1) that the powers vested in the judicial officers named in the Act were conferred upon each of them as *persona designata*, which they were not authorized to delegate to others or to each other; (2) that the reference was not authorized by the Judicature Act or Rules, or the prior Acts and Rules conferring jurisdiction upon the former judicial officers in Chambers; (3) that the jurisdiction of the Master-in-Ordinary under order of the reference would be a delegated jurisdiction as the substitute or deputy of the Master in Chambers, and not the co-ordinate jurisdiction conferred upon his office by the Act; (4) that the order of reference was not therefore warranted by the Dominion or Provincial Acts, and could not be proceeded on.

A judicial officer cannot delegate the discharge of his judicial functions to another unless expressly empowered so to do.

The various kinds of references to

judicial officers under the Ontario Judicature Act commented upon. *In re Queen City Refining Company*, 415.

7. *Winding-up company—Rent—Landlord—Liquidator—* 45 Vic. ch. 23 (D.)—The winding up of a company under 45 Vic. ch. 23 (D.), commences from the time of the service of the notice under sec. 12, and, therefore, under sec. 69 a landlord's claim to be paid preferentially for overdue rent after such service is invalid.

An undertaking by a provisional liquidator in possession to pay such a claim is, by secs. 20 and 21, void unless the permission of the Court is first obtained. *Fuches v. Hamilton Tribune Company*, 409.

See EXAMINATION, 6, 13—JUDGMENT, 6.

## COSTS.

1. *Costs — Scale of.*] — After a mortgage sale the first mortgagee paid the surplus proceeds of sale, \$162, into Court. The third mortgagee petitioned for payment out to him of the \$162 alleging that the second mortgage was void for want of consideration, &c.

A reference was directed, and the Master found that the second mortgage was valid and that a much larger amount than \$162 was due upon it. The claimants of the fund lived in three different counties. An order made upon further directions gave the second mortgagee the costs of the petition and reference.

*Held*, that what was in contest was the whole amount represented by the second mortgage, and the subject matter thus involved exceeded the limits of the former equitable jurisdiction of the County Court, and therefore, and also because the different respondents resided in different counties, and the money in question was in Court in a third county, the taxing officer was right in taxing costs upon the higher scale. *Re Lyons*, 150.

2. *Taxation — Witnesses — Abortive trial—Rule 442 O. J. A.*]—A taxing officer refused to allow the plaintiffs the expenses of seventeen witnesses who were subpoenaed to attend a trial at Hamilton which proved abortive, the trial being postponed because the defendants had not obeyed an order to produce.

The defendants were ordered to pay the costs of the hearing at Hamilton rendered nugatory by the postponement.

The seventeen witnesses were subpoenaed to be examined at the abortive trial, and were examined at the adjourned trial upon matters which the Judge held could not be interfered with by the Court.

*Held*, that in refusing the plaintiffs the costs of subpoenaing these seventeen witnesses, the taxing officer did not erroneously exercise the discretion given him by Rule 442 O. J. A. *Christopher v. Noxon et al.*, 149.

3. *County Court — Liquidated amount by act of parties — Costs.*]—An action in the Common Pleas Division for \$228.20, the balance of a claim of \$1,828.20 for 8,310 lbs. of butter at 22c. per pound. \$1,600 had been paid on account of the claim.

The plaintiff obtained a verdict

for \$228.20, but the Judge refused to certify for costs.

*Held*, on a motion to a Judge for an order directing the defendant to pay to the plaintiff full costs without deduction or set-off, that the amount was liquidated by the act of the parties, within the meaning of R. S. O. ch. 43, sec. 19. sub-sec. 2, and the plaintiff without a Judge's certificate was entitled to County Court costs only. *Durnin v. McLean*, 295.

4. *Costs—Scale of—Title to Land—Pleading—Admission—Set-off*]—In an action in the Common Pleas Division, for trespass to lands and removal of fixtures, the plaintiff recovered a verdict for \$50.

The taxing officer taxed Division Court costs to the plaintiff, and full costs to the defendant.

The pleadings admitted an entry under an agreement as to placing fixtures, and their removal and appropriation, but put in issue their wrongful removal.

*Held*, that the taxing officer was right, the title to corporeal hereditaments not being in question.

*Held*, also, that though the defendant had failed to prove his defence, he was entitled to set-off his costs.

When a pleading contains an answer to allegations in the opposite pleading, which is insensible if not read as admitting certain statements, those statements must be taken as admitted. *Richardson v. Jenkin*, 292.

5. *Costs—Tender—Payment into Court.*]—The defendant brought in to Court with his defence a sum which he pleaded was sufficient to answer the plaintiff's claim, and the Judge at the trial finding that it was

sufficient, directed judgment to be entered for the defendant, with costs.

*Held*, that the Judge at the trial had a discretion to deal with the question of costs, and having exercised it, the taxing officer had no alternative but to tax to the defendant his full costs incurred, as well before as after the payment into Court. *Small v. Lyon*, 223.

6. *Costs—Alimony action—R. S. O. ch. 40, sec. 48.*]—Pending an action for alimony and before trial, the plaintiff returned to live with the defendant.

*Held*, that the defendant should pay only the cash disbursements of the plaintiff's solicitors.

*Keith v. Keith*, 25 Gr. 110, considered. *Ringrose v. Ringrose*, 299.

*Costs—Alimony action—R. S. O. ch. 40, sec. 48.*]—The decision of PROUDFOOT, J., *ante* p. 299, was affirmed on appeal. *Ringrose v. Ringrose*, 596.

7. *Appeal—Surrogate Court—Scale of Costs.*]—Costs of an appeal from the Surrogate Court to the Court of Appeal should be taxed on the scale of the Court appealed from, as provided by Rule 28 of the Court of Appeal, and not on the scale of County Court appeals. *Regan v. Waters*, 364.

8. *Mortgage—Sale under power—Surplus—Account as to—Scale of costs—Rule 515 O. J. A.*]—Mortgagees after the exercise of the power of sale in their mortgage claimed that \$182.61 was still due to them, but on an account being taken \$20.07 was found due to the mortgagee.

*Held*, that laying aside the question of the whole amount of the mortgage money (\$6,705) the amount involved was \$202.68 and therefore the case was not within rule 515 O. J. A. (C. S. U. C. ch. 15, sec. 34, subsec. 8), and the costs were properly taxed on the higher scale.

The claim of a mortgagee against a mortgagee for an account in such a case is not a legal one as for a money demand, but a proper subject for equitable relief. *Morton v. Hamilton Provident and Loan Society*, 636.

9. *Costs—Taxation—Special circumstances.*]—The bill of costs in question was for professional services rendered the defendant in an investigation of his conduct as a public official before a commissioner appointed by the Ontario Government.

The special circumstance relied upon to enable the defendant to obtain the order for taxation after the lapse of more than a year from the delivery of the bill was, in the words of the defendant, that "there was a distinct understanding between me and the above named plaintiffs, that the payment of the said bill of costs was to lie over to await the decision of the Ontario Government, who were by both me and the said plaintiffs, as they stated, expected to pay the said bill of costs, I being one of their officers, and the charges against me having fallen through."

*Held*, that the existence of the above understanding, if proved, was not a special circumstance within R. S. O. ch. 140, sec. 35, to justify an order for the taxation of the bill after the lapse of a year from its delivery; but that the bill should have been taxed subject to it. *Fletcher et al. v. Field*, 608.



10. *Costs — Taxation—Appeal—Cases printed and argued together—Defendants severing.*—The defendants were the same in all three actions. The actions were brought against the defendants other than the company as wrongdoers. They were sued for an alleged conspiracy to defraud, which it was alleged they carried into effect by defrauding the plaintiffs respectively. The defendant McLean defended, meeting the charge directly. The other defendants did the same, but they further said that they obtained their information from McLean, and that they believed it to be true, and believed that the statement made by them and McLean, which was the foundation of the actions, was true.

*Held*, that the taxing officer was right in allowing two bills of costs, one to the defendant McLean and one to the other defendants.

When the actions were in the Court of Appeal, Burton, J.A., made an order that only one appeal book should be printed for the three cases, and the three cases were argued together.

*Held*, that the taxing officer was right in allowing separate counsel fees in each case.

*Quære*, whether the appeal should not have been to a Judge of the Court of Appeal, instead of to one of the Chancery Division. *Petrie v. Guelph Lumber Company et al.*—*Stewart v. Guelph Lumber Company et al.*—*Inglis v. Guelph Lumber Company et al.*, 600.

11. *Costs—Payment of, pending appeal.*—The defendants being entitled by the judgment of the Court of Appeal to the costs of the action, obtained out of Court for suit the bond given by the plaintiff for security for such costs.

Before action on the bond, and pending an appeal by the plaintiff from the judgment of the Court of Appeal to the Supreme Court of Canada, one of the sureties on the bond obtained leave and paid into Court to the credit of this action \$400, the amount due on the bond, to abide further order. Upon application of the defendants, the company, Boyd, C., directed \$200 of the \$400 to be paid out to their solicitors, upon the solicitors undertaking to refund the amount if the Supreme Court should vary the disposition of costs made by the Court of Appeal. *Kelly v. Imperial Loan Co. et al.*, 499.

12. *Taxation — Duty of taxing officer—Division Court costs—Jurisdiction of Division Court.*—An action for the price of two distinct parcels of goods sold and delivered. The defendants accepted a bill of exchange for each parcel, one bill being for \$103.80, and the other for \$106.40. At the time the action was brought the second bill had not matured, as was alleged by the defendants, and afterwards admitted by the plaintiffs. Upon the application of the plaintiffs the Master made an order, under Rule 322 O. J. A., for final judgment against the defendants for the first parcel of goods sold and delivered, that is for \$103.80, with interest and costs of suit, including the costs of the application, "to be taxed according to the course and practice of the Court."

Under this order the taxing officer allowed the plaintiffs County Court costs on that part of their claim upon which they obtained the order for judgment, and he allowed to the defendants the full costs of the High Court of Justice on that part of the plaintiffs' claim upon which the de-

defendants succeeded, that is, upon the claim for \$106.40, the price of the second parcel of goods.

Upon an application by the defendants to revise the taxation :—

*Held*, in that it was the duty of the taxing officer to look at the pleadings, and if necessary to receive affidavits so as to ascertain the facts of the case.

(2) That Division Court costs only should have been taxed to the plaintiffs, as the amount for which they obtained judgment was ascertained by the signature of the defendants, and was therefore within the competence of the Division Court.

In that the defendants should have Superior Court costs down to and including the statement of defence, which would not have been required but for the plaintiffs claiming improperly the price of the second parcel of goods, which was not due, and also their costs of this application, with a set-off *pro tanto* against the plaintiffs' judgment and costs. *White Sewing Machine Company v. Belfry et al.*, 64.

13. *Principal and surety—Costs.* ]—Judgment for a debt was obtained by the plaintiffs against the defendants, who stood towards one another in the relation of principal and surety. The surety paid the plaintiffs the amount of their debt and costs, took an assignment of the judgment, and then proceeded to enforce it against his principal.

*Held*, that the costs as well as the debt were recoverable by the surety, as against the principal. *Victoria Mutual v. Freel*, 45.

See ACTION—ALIMONY, 1, 2, 3, 4  
—HUSBAND AND WIFE, 2—BILL OF

COSTS, 1, 2, 3—COMMISSION—CORPORATIONS, 5—ELECTION, 1, 2—INFANT—INTERPLEADERS, 6, 9—JURY NOTICE, 2—LIEN—PROHIBITION, 2—SOLICITOR AND CLIENT.

## COUNTER-CLAIM.

1. *Counter-claim—Surety—Indemnity.* ]—An action against the defendant on his bond as surety for H. & McT. for the amount due the plaintiffs by H. & McT. on their banking account with the plaintiffs. Counter-claim by the defendant against the plaintiff and H. & McT., alleging that the defendant is liable only as such surety, and that the plaintiffs ought to resort to H. & McT. to enforce payment from them, and that H. & McT. should be ordered to pay the amount, and indemnify the defendant.

As the counter-claim was not rested upon any particular agreement, but was set up as arising from the position of the parties as creditors, principal debtor and surety, it was held bad, and ordered to be struck out. *Federal Bank v. Harrison*, 271.

2. *Ejectment—Counter-claim—Rules 116, 127 (b), 168 O. J. A.* ]—In an action of ejectment, G., the landlady of the defendant C., intervened and appeared to the writ. C. did not appear until statement of claim delivered, when he appeared and joined with G. in the statement of defence. *Held*, that the appearance of C. was regular.

The defendant C. counter-claimed for damages in respect of a trespass by the plaintiff upon the lands in



question, whilst he C. was in possession, and for an assault, &c., whereby he was compelled to quit the premises.

*Held*, that the counter-claim was not joining another cause of action with an action for the recovery of land within the meaning of Rule 116, O. J. A.

*Held*, also, that the counter-claim should not be disallowed or excluded under Rules 127 (b.) or 168, O.J.A., on the ground of inconvenience, it not appearing that there would be any inconvenience : and

*Semble*, that the counter-claim was sufficiently connected with the cause of action to make it advisable that they should be tried together. *Goring v. Cameron*, 496.

### 3. Counter-claim—Third parties.]

—In an action by the plaintiffs as endorsees of a bill of exchange, the defendant (the acceptor) set up that the bill was part of the price of goods bought by them from H. & G., the drawers, and filed a counter-claim against the plaintiffs and H. & G. as defendants by counter-claim, claiming that the bill was transferred to the plaintiffs after maturity, with full notice and knowledge of the facts, and claiming \$10,000 damages from H. & G. for breach of contract in respect of the goods, and asking for the delivery up and cancellation of the bill, and other bills in the same transaction.

Upon the application of H. & G. the Master in Chambers struck out the counter-claim, and the names of H. & G. as defendants.

*Semble*, that as against the plaintiffs, the defence should have been pleaded as a defence to the claim on the bill. *Torrance et al. v. Livingstone*, 29.

## COUNTY JUDGE

*See* REFERENCE, 3.

## COURT.

*See* PROHIBITION, 4.

## CREDITORS' RELIEF ACT, 1880, (O.)

*Execution — Sheriff—Levy — Creditors' Relief Act*, 1880, (O).]—The plaintiffs placed a writ of execution against the defendant in the hands of the sheriff of Ontario on the 6th December, 1884. The sheriff seized the defendant's goods on the 8th December. The defendant made a mortgage on his goods to D. on the 9th December. B. placed a second execution against the defendant in the hands of the sheriff on the 22nd December. On the 31st December the mortgagee, D., paid to the sheriff the whole amount of the first execution, \$115, specially appropriating the payment to that execution.

*Held*, that the money paid to the sheriff was not levied by him within the meaning of the Creditors' Relief Act, 43 Vic. ch. 10 (O.), and that the first execution creditor was entitled to the whole of it. *Davies Brewing and Malting Co. v. Smith*, 627.

## DEBT.

*See* ATTACHMENT.

## DEMURRER.

1. *Demurrer—Omission to enter—Motion for judgment—Rule 195 (a) O. J. A.*—A defendant did not, within ten days after delivery of a demurrer to a paragraph of the statement of defence enter it for argument and give notice, nor serve an order for leave to amend, as required by Rule 195 (a) O. J. A.

*Held*, on an *ex parte* motion by the plaintiff for judgment upon his demurrer, that the proper practice in such a case is to apply to a Judge in Court, upon notice to the opposite party, for an order to strike out the pleading or part of the pleading demurred to, and for a direction as to payment of costs; but on the return of the motion the party in default will have no right to be heard as to the validity of the pleading. *Livingston v. Trout*, 493.

2. *Demurrer—Setting aside as frivolous*—A demurrer to a statement of claim raised the question whether in an action against a shareholder living in Ontario, in a Quebec Joint Stock Company incorporated under the Dominion Joint Stock Companies' Act, 1877, it is sufficient to show a judgment and execution thereon returned unsatisfied in Quebec, or whether this must be shown in Ontario.

*Held*, that the demurrer was not frivolous.

*Semble*, the jurisdiction as to setting aside demurrers as frivolous, should rarely be exercised where the point is a new one, and is apparently raised in good faith to obtain the opinion of the Court. *Brice v. Munro*, 546.

## DISCOVERY.

*See* EXAMINATION, 6, 8, 10, 11.

## DISCRETION.

*See* CORPORATIONS, 2—COSTS, 2—PROHIBITION, 3.

## DISMISSAL.

*See* MOTION TO DISMISS.

## DIVISION COURT.

1. *Division Court—Jurisdiction of—Service—R. S. O. ch. 47, secs. 62, 244—Rules 8, 45, sec. 77, O. J. A.*—Service upon a defendant resident out of the jurisdiction is not a principle of practice within the meaning of sec. 244 of the Division Court Act, but a branch or a system of practice, or a means of relief which the procedure in Division Courts does not admit of being applied.

Neither R. S. O. ch. 47 sec. 244, nor Rules 8 and 45, O. J. A., make applicable to Division Courts the statutory rules and practice governing service on defendants out of the jurisdiction in actions in the Superior Courts.

The Grand Trunk Railway having their head office in Montreal, P. Q., are not defendants residing or carrying on business in this Province, within the meaning of R. S. O. ch. 47, sec. 62.

*Held*, that the service of the writ in this action on the station-master of the defendants at Bowmanville, was void, but the defendants having appeared at the trial, and after their objection to the jurisdiction had been overruled, having proceeded with the defence and cross-examined witnesses, &c., *Held*, that they had

thereby precluded themselves from objecting to the jurisdiction. *In re Guy v. Grand Trunk Railway Company*, 372.

2. *Prohibition—Division Court—Jurisdiction—Set-off.*—The plaintiff brought his action in a Division Court for \$74.31, his claim being \$156.36, an unascertained amount, as against which he admitted a set-off of \$82.05. At the trial in the Division Court the plaintiff affirmed, and the defendant denied, that there had been an agreement between them to set off against the plaintiff's claim the value of certain purchases made by the plaintiff from the defendant, and the Judge at the trial found, as a matter of fact, that there had been such an agreement.

*Held*, following *Fleming v. Livingstone*, 6 P. R. 63, and *Dixon v. Snarr*, 6 P. R. 336, that it was a question of fact for the Judge of the Division Court to determine whether or not there was an agreement between the plaintiff and defendant; and the Judge having determined that there was, there was jurisdiction, and a prohibition was refused. *In re Jenkins v. Miller*, 95.

3. *Division Court—Jurisdiction—Prohibition.*—“Mr. Thomas Forfar. —Please ship us your old boiler and engine, to be in good shape, to our address, not later than June 7th, 1883, for the sum of \$115 and shafting.—G. Climie & Son.”

*Held*, that the foregoing order did not ascertain the amount due, so as to bring the case within the increased jurisdiction of the Division Courts under 43 Vic. ch. 8, (O). *Forfar v. Climie*, 90.

*See* CAUSE OF ACTION, 2—COSTS, 13—PROHIBITION, 1, 2, 3, 4, 5.

## DIVISION COURTS ACT, 1880.

*See* GARNISHEE.

## DIVISIONAL COURT.

*See* REHEARING.

## DOMICILE.

*See* ARREST—CAUSE OF ACTION, 1.

## DOWER.

1. *Action for dower—Striking out pleas in statement of defence—Reference as to damages without trial of issues on record—Jurisdiction of Master—O. J. A. secs. 47 and 48.*—In an action for damages for detention of dower, defendants pleaded (1) that the lands in question were wild, and plaintiff was not entitled to the sum claimed for damages, if any; (2) that plaintiff had assigned her claim for damages; (3) set-off for moneys expended in respect of said lands; (4) that they did not detain, but were always willing, &c.

On a motion in Chambers, after issue joined, for an order directing a reference as to the damages under sec. 47 O. J. A., and upon evidence by affidavit both for and against the truth of the pleas, the Master made an order striking out the 2nd and 3rd pleas, and directing a reference.

*Held*, that the Master had no jurisdiction to make the order, and that the issues raised questions that were properly triable only at the hearing. *Ryan v. Fish et al.*, 187.

2. *Dower—Pleading—Rule 128, O. J. A.*—The statement of claim in an action of dower alleged that

the plaintiff was the widow of L., who died seized of such an estate (in certain lands) as to entitle and give the plaintiff an estate of dower therein.

*Held*, that the pleadings in dower are governed by the O. J. A.; that the right of dower is a legal conclusion from certain facts, and these facts should be stated in the pleading.

The statement of claim was therefore held insufficient, and was struck out, leave being given to amend.  
*Lauder v. Carrier et al.*, 612.

## EJECTMENT.

*See* COUNTER-CLAIM, 1—JUDGMENT, 7.

## ELECTION.

1. *Dominion election — Penalties — Wilful delay — Dismissal of action — Uncontradicted charges of bribery — Costs.*—The acts of bribery complained of were committed between the 13th and 23rd of June, 1882. The writ was issued on the 12th June, 1883, and was served on the defendant on the 27th November thereafter. The defendant, on the 30th November, moved to dismiss the action for wilful delay in prosecution under 39 Vic. ch. 9.

The plaintiff's solicitor swore that he was also solicitor for the petitioner in the Lennox election petition, at which election the acts of bribery complained of were alleged to have been committed, and in order not to endanger the success of that petition it was deemed advisable not to serve the writ until that petition was disposed of, which on account of objections to the jurisdiction, was not

tried till 10th October, 1883. He also deposed that at the trial of the election petition an application was made for a summons against the defendant under 39 Vic. ch. 9, to have the penalties for bribery imposed upon him; and that the application was not disposed of till the 23rd November, at which date the Judge declined to interfere.

*Held*, that such delay as would not expose an ordinary suit to dismissal may be fatal to an action under this Act, under the special provision that such an action shall be carried on without wilful delay.

*Held*, also, there had been wilful delay not to be excused by the explanations given, and that the plaintiff was entitled as of right to have the action perpetually stayed or dismissed.

The order was made, dismissing the action without costs, for the reason that a *prima facie* case of bribery was established against the defendant, which he had not attempted to contradict. *Miles v. Roe*, 218.

2. *Ontario Controverted Elections Act—Costs — Interviewing witnesses before trial.*—A petition under the Ontario Controverted Elections Act, R. S. O. ch. 11, was dismissed, with costs.

*Held*, on appeal (reversing the decision of one of the taxing officers) that under secs. 97 and 100 of R. S. O. ch. 11, the respondent was not entitled to tax against the petitioner, the costs of interviewing before the trial persons named in the petitioner's bill of particulars as bribers and bribees. *Re West Middlesex Election Case—Johnson v. Ross*, 509.

3. *Election — Trial — Extending time*—38 Vic. ch. 10, (D.)—An order



may be made extending the time for the trial of an election petition under 38 Vic. ch. 10, sec. 2, (D.), notwithstanding that six months have elapsed since the presentation of the petition, and though the application for such extension is not made within the six months.

*Semble*, if the trial be not commenced within the six months the respondent should move to dismiss the petition. *Re West Middlesex Election Petition—Walker v. Ross*, 27.

### ENDORSEMENT.

*Special Endorsement—Judgment—Rules 14 and 80 O. J. A.*—A writ of summons was specially endorsed under Rule 14, O. J. A., “The plaintiffs’ claim is \$1,702.72 for money lent by the plaintiffs to the defendant the same being the amount due to the plaintiffs’ branch or agency office at P., and interest thereon from the 1st day of December, 1884, until judgment. On motion for judgment under Rule 80,

*Held*, that it was necessary for defendant’s information to state the date at which his account was overdrawn to the amount specified, and that this endorsement was therefore insufficient. *Ontario Bank v. Burk*, 648.

*See JUDGMENT, 1—LIS PENDENS.*

### ESTOPPEL.

*See ADMINISTRATION, 4—HUSBAND AND WIFE, 3.*

### EVIDENCE.

*See EXAMINATION—JUDGMENT, 9—LEGATEE—PUBLICATION.*

### EXAMINATION.

1. *Examination of judgment debtor—Unsatisfactory answers.*—A satisfactory answer, upon examination as a judgment debtor, according to the statute R. S. O., ch. 50, sec. 305, means more than that the answer shall be a full, appropriate, and pertinent answer to the question: it means that the answer shall show a satisfactory disposition of the property.

The defendant in his examination said he had no real estate nor any personal estate.

In the fall of 1882 he had about \$300 in money; he paid his bills with it, and lost the balance at the horse races at Buffalo. Since the fall of 1882 he has been in his father’s employ; he gets nothing but his board and clothing.

When asked as to the conveyance of the tannery lot to his father, which he held in trust for him, he said: “I could not say what the consideration was, or whether I was paid anything or not; I forget; I can’t think of it, I forget whether I received any money for that then or since; it was before judgment. \* \* My father wanted me to get it fixed.”

*Held*, that the defendant, in his examination, had disclosed his property and his transactions respecting the same; and had not concealed or made away with his property in order to defeat or defraud his creditors.

*Held*, however, that the defendant had not answered fully or truthfully



with respect to the fact of receiving or not receiving money or other consideration; and that the answers he had given respecting his transactions with his property were not satisfactory by reason of the illegal and wrongful disposition of it by gambling or horse-racing and otherwise.

Defendant was allowed to appear for further examination, and ordered to pay costs of first examination and this application forthwith. *Crooks v. Stroud*, 131.

2. *Examination—Notice to solicitor—Rule 455 O. J. A.* Rule 455 O. J. A., applies to the Chancery Division of the High Court of Justice. The service of a copy of an appointment to examine on the plaintiff's solicitor on a Saturday for a Monday is insufficient. *Lovelace v. Harrington*, 157.

3. *Examination—Parties.*—The former Chancery Practice as to the stage of the cause at which examination of parties may be had, now governs in all divisions of the High Court,

In this case an appointment to examine under sec. 159 of the C. L. P. Act was set aside because the affidavit required by that section had not been filed. *Tilsonburg Manufacturing Company v. Goodrich*, 327.

4. *Examination — Witnesses — Breach of promise of marriage.*—Since the passing of 45 Vic. (O.) ch. 10, sec. 3, the parties to an action for breach of promise of marriage are both competent and compellable witnesses, and may therefore be examined under the C. L. P. Act. *McLaughlin v. Moore*, 326.

5. *Examination—Witness—Pending motion—G. O. Chy.* 266—*Rule 285 O. J. A.*—Upon a motion, pending, witnesses may still by G. O. Chy. 266 be examined under a subpoena and appointment.

That order has not been superseded by Rule 285 O. J. A.

*Township of Monaghan v. Dobbin*, 2 C. L. T. 260, overruled. *McMillan v. Wansborough*, 377.

6. *Examination — Discovery — Officers of Corporation.*—In an action upon a fire insurance policy against a company,

*Held*, that the local agent of the company, who received the application and the premium and issued the interim receipt, and his successor, who had charge of the agency when the fire occurred, were properly examinable for discovery, before the trial, as officers of the company under the C. L. P. Act.

*Quere*, whether a person may be an officer examinable for the purposes of discovery, but not one whose evidence can bind the company. *Goring v. The London Mutual Fire Ins. Co.*, 642.

7. *Examination of witness de bene esse—Ex parte order — Affidavit of information and belief.*—*Held*, following the former Chancery Practice, that a local Judge may make an *ex parte* order for the examination of a witness *de bene esse*, on the ground that he is dangerously ill, and not likely to recover.

*Seem*, that an affidavit of the solicitor of his information and belief, with the grounds thereof, that the witness is dangerously ill is sufficient.

The affidavit, and the circumstance that the order was not acted upon

for thirteen days after it was issued, were regarded as unsatisfactory, and limitations were imposed upon the use at the trial of the evidence taken under the order. *Baker v. Jackson*, 624.

8. *Discovery—Partner—Rule 224 O. J. A.*—An action against an endorser of a promissory note, brought by a member of the firm of bankers who discounted it. The firm was composed of two members only, B. and M., who had dissolved partnership, and the action was brought after the dissolution in the name of M. only.

The Master-in-Chambers made an order under Rule 224 O. J. A. for the examination of, and the production of documents by B., as a person for whose immediate benefit the action was being prosecuted.

On appeal, ROSE, J., thought the evidence as to the interest of B. unsatisfactory, but refused to set aside the order of the Master, varying it, however, by directing that the examination of B. and his affidavit on production should not be used except for the purpose of discovery. *Minkler v. McMillan*, 506.

9. *Patent case—Particulars—Examination.*—The general law applicable to discovery governs in patent cases.

A defendant may be properly interrogated as to the grounds of his attacking a plaintiff's patent, and there should be a fair and full disclosure of the particular lines of attack which are contemplated, but no such individualizing of the persons who are alleged to be prior users as would enable the plaintiff to fix upon the defendant's witnesses. *Smith v. Greey et al.*, 482.

10. *Examination—Discovery—Rule 224, O. J. A.*—One M. having effected certain insurances in his favour, assigned one of the policies to the plaintiff, one of his creditors, and the other to one C., as trustee for the benefit of creditors. In actions on such policies—

*Held*, that M. was examinable under Rule 224, O. J. A., as "a person for whose immediate benefit" the suits were prosecuted. *Macdonald v. Norwich Union Ins. Co. and Clarkson v. Fire Ins. Association*, 462.

11. *Discovery—Privilege—Answers tending to criminate—13 Eliz. ch. 5.*—*Held*, that the penal provisions of the statute 13 Eliz. ch. 5, afford no excuse for a refusal by a defendant in an action brought to set aside a fraudulent conveyance to answer questions put to him regarding the fraudulent transaction. *Dunsford v. Carlisle*, 449.

12. *Examination of witness—Rule 285 O. J. A.*—An order for examination of a witness before trial under O. J. A., will not be made where no greater necessity for it is shewn than the convenience of the party who applies for it in preparing, and presenting his case for trial. *Carnegie v. Federal Bank*, 69.

13. *Examination—Officer of corporation.*—A station agent of a railway company is an officer examinable under R. S. O. ch. 50, sec. 156. *Ramsay v. Midland R. W. Co.*, 48.

*See AFFIDAVIT ON PRODUCTION—FOREIGN COMMISSION, 1, 2, 3—HUSBAND AND WIFE, 1—PRODUCTION, 4—SPECIAL EXAMINER.*

## EXECUTION.

See ABSCONDING DEBTORS' ACT, 1  
—CREDITORS' RELIEF ACT, 1880 —  
INTERPLEADER, 5, 8 — LEGATEE —  
REPORT.

## EXECUTORS.

*Judgment against executors—Form of plea.*—To an action on two promissory notes against the executors of the maker they pleaded—

1. That they never were executors.

2. *Plene administravit.*

The plaintiff obtained a verdict, and judgment was entered for the debt and costs to be levied of the goods of the testator in the hands of the defendants, his executors, if they had so much thereof, and if not, then to be levied of the proper goods and chattels of the defendants.

A motion to amend the judgment by relieving the defendants from personal liability was refused with costs, for, as they had denied their representative character, the plaintiff was entitled to such judgment. *Huyck v. Proctor*, 25.

See ADMINISTRATION, 5.

## EXECUTOR DE SON TORT.

See ADMINISTRATION, 4.

## FI. FA.

See INTERPLEADER, 2, 9—WRIT OF ATTACHMENT.

## FOREIGN COMMISSION.

1. *Foreign Commission—Names of witnesses—Professional or expert evidence.*—An action to restrain an alleged nuisance, caused by the defendants' cattle byres in the city of Toronto.

An application by the defendants for the issue of commissions to certain cities in the U. S. A., to take evidence in their behalf concerning the cattle byres in those cities.

It was admitted that the only point on which witnesses in the States could be usefully examined was, as to whether proper means had been taken by the defendants to minimize the objectionable accompaniments or incidents of their business. None of the persons sought to be examined were named in the application, nor was it sworn that such persons could not be ready to attend personally at the trial.

*Held*, upon this state of facts, that the order for the commissions must be refused.

As a rule the Courts discountenance professional or quasi-expert evidence from being brought before them in writing. *The Attorney General v. Gooderham and Worts et al.*, 259.

2. *Witness—Credibility—Commission.*—A commission will issue to examine a witness, notwithstanding that his character for veracity is impeached.

The proper course in such a case is to call witnesses at the trial for that purpose. *Nordheimer et al. v. McKillop et al.*, 246.

3. *Commission—Evidence.*—A commission to take evidence out of the jurisdiction will not be ordered

till after issue joined, nor then unless the applicant shews by affidavit what evidence he expects to obtain from the witness. *Smith v. Greey*, 531.

See INTERROGATORIES — PRODUCTION, 5.

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## FOREIGN CONTRACT.

See CORPORATIONS, 1.

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## FOREIGN DEFENDANT.

See DIVISION COURT, 1

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## FRAUD.

See ADMINISTRATION, 4 — SOLICITOR AND CLIENT.

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## FRAUDULENT CONVEYANCE.

See EXAMINATION, 11.

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## GARNISHEE.

*Garnishee—Appeal.*]—An appeal does not lie under the Division Courts Act 1880 on a question arising between a primary creditor or plaintiff and a garnishee.

Section 17 of the Act gives the right of appeal to “any party to a cause,” but a garnishee is not a “party to a cause;” he is merely a party to the proceedings.

*Beswick v. Bappy*, 9 Ex. 315 followed, but not approved of. *Cameron v. Allen*, 192.

See PRODUCTION, 1.

## HUSBAND AND WIFE.

*Privileges of witnesses—Answers tending to criminate husband and wife.*]—In an action of libel against a husband as the writer of libellous articles, and as editor of a newspaper in which they were printed, and his wife as owner and publisher of the newspaper. On examination after issue joined in the action, the husband refused to answer questions as to the ownership of the newspaper on the ground that his answers might tend to expose his wife to a criminal prosecution for publication of the libels, and the wife refused to answer questions as to the authorship of the newspaper articles in question, and as to the editing of the newspaper, on the like grounds as to her husband.

*Held*, on appeal, that defendants were justified in their refusals. *Millette v. Little*, 265.

2. *Lunacy—Husband and wife—Separate estate — Creditors—Costs.*]—A petition was presented by the husband of D. to declare his wife a lunatic, which was opposed by her.

Pending the hearing of the petition D. assigned her separate estate for the benefit of her creditors.

The Court dismissed the petition.

D.’s solicitor presented a petition for taxation of D.’s costs, and for payment by the assignee in priority to the claims of the creditors.

*Held*, that the costs of opposing the petition might be classed as necessities which the wife is liable to pay out of her separate estate, and for which that estate is liable in the hands of her assignee, but that they could not be put on the footing of maintenance. Such costs should be paid ratably out of the assets, and costs subsequent to the assignment



should not rank in competition with creditors before the assignment. *Re Dumbrell*, 216.

3. *Estoppel—Pleading—Jurisdiction of Master—Indemnity to trustee under a void trust deed—Husband and wife—Agency—Maintenance of children.*—Where a party does not plead a prior judgment in bar by way of estoppel before the entry of a judgment directing a reference to the Master in Ordinary, he waives it, and leaves the whole matter at large to be enquired into on the evidence.

The Master has no jurisdiction to make amendments to the pleadings after judgment; nor could he give leave to file a statement in his office raising a defence which ought to appear in the pleadings.

It is incident to the office of a trustee that the trust property shall reimburse him for his expenses in administering the trust; and a clause so indemnifying a trustee is infused into every trust deed; and the statute R. S. O. ch. 107, sec. 3, does little more than what Courts of equity had been accustomed to do without any statutory direction.

Therefore a trustee who had been induced by a settlor to accept a trust under an instrument void by the law of the settlor's domicile, is entitled to be reimbursed by such settlor for all his expenses incurred in the execution of the trust.

The defendant's wife, who had been supported by the plaintiff with the defendant's consent, returned to her husband's home, but was turned out of the house by him, whereupon the plaintiff again took charge of, and supported her.

*Held*, that the defendant, by turning his wife out of his house, sent

her forth as his delegated agent to pledge his credit for the necessities of life suitable to her position, and that the plaintiff was therefore entitled to assert a claim against the defendant for his expenses in so supporting the defendant's wife. And such claim can be maintained up to the date of a judgment allowing alimony to the defendant's wife.

Where a father whose children are maintained by another, and who could have obtained possession of their persons by *habeas corpus*, allows them to be so maintained, he is liable for their support and maintenance, to the person in whose care such children are. *Hughes v. Rees*, 301.

4. *Insurance for wife and children—40 Vic. ch. 20 (O).—Administrator not trustee of such moneys—Jurisdiction of Master—Payment into Court.*—A testator insured his life for the benefit of his wife and children. The policy provided that the money should be payable as might be directed by will. The testator by will appointed executors, and gave his wife the income of his estate for life and after her death the corpus to his son. The executors renounced probate, and after revocation of a prior grant to the son, who was then a minor, administration was granted to the defendant P. The policy provided that the money might be payable to the executors or administrators. The Act 47 Vic. ch. 20, (O) provides that such policy moneys to which infants are entitled shall be payable to a "trustee, executor, or guardian." P. claimed the moneys as administrator, whereupon the Insurance Company under sec. 15 of the Act, and G. O. 197, and rule 541 (a) O. J. A., applied to the Master-in-Ordinary in Chambers for



leave to pay the moneys into Court. The Master held (1) that voluntary applications to pay in money may be made in Chambers. (2) That under rule 541 (a) O. J. A., he had jurisdiction, by virtue of the administration proceedings before him to make the order. (3) That by the renunciation of the executors there was no "trustee, executor, or guardian competent to receive the share of the infant." (4) That the Act excluded the administrator from any claim to the fund, and his receipt would not be within the protection of the Statute. (5) That the administrator was not a trustee by the will, except as holding surplus assets, after administration with notice of a trust. (6) That the money was no part of the estate subject to the control of creditors, and when paid in should be "ear marked," and not mixed with the other funds of the estate.

On appeal by the administrator, P., Proudfoot, J., made an order directing that the money in Court be paid out to the Insurance Company. *Merchants Bank v. Monteith, Ex parte Standard Life Assurance Co.*, 588.

### IMPROVEMENTS UNDER MISTAKE OF TITLE.

*Improvements under mistake of title—R. S. O. ch. 95, sec. 4—Occupation rent — Tenants-in-common—Cutting timber.*]—Improvements made under a mistake of title are not, since R. S. O. ch. 95, sec. 4, to be allowed for as liberally as improvements made by a mortgagee in possession.

The enhanced value of a farm, improved under a mistake of title, is found by deducting from the

present value of the land, with the improvements, the estimated present value of the land without the improvements, plus any increase in value from other causes than such improvements.

The occupation rent chargeable to a person improving land under a mistake of title is the rental value of the land without the improvements.

A tenant-in-common occupying the common property is not chargeable with the value of timber cut by him on such property during his occupancy. *Munsie v. Lindsay*, 173.

### INFANT.

*Imperial Act 33 Geo. III. ch. 87—R. S. O. ch. 40, secs. 34 and 35, ch. 46, sec. 32—Appointment of infant administrator—Nullity of suits by an infant—Liability for costs.*]—The 6th sec. of 38 Geo. III. ch. 87 (Imperial), prohibiting the grant of probate to infants under the age of 21, is in force in Ontario, either as a rule of decision in matters relating to executors and administrators (R. S. O. ch. 40, sec. 34 and 35) or as a rule of practice in the Probate Court in England (R. S. O. ch. 46, sec. 32).

An infant cannot lawfully be appointed administrator of an estate; and therefore a grant of probate or of letters of administration to an infant is void, and confers no office on, and vests no estate in such infant.

An infant had been appointed administrator of an estate, and various suits had been brought in his name on behalf of such estate:

*Held*, that being an infant he was incapable of bringing suits in his own name, or of making himself or the

estate he assumed to represent liable for the costs of such suits.

The 57th and 58th sections of the Surrogate Act (R. S. O. ch. 46) protects parties *bond fide* making payments to an executor or administrator notwithstanding any invalidity in the probate or letters of administration, but they do not protect payments made to third parties by an infant assuming to act as administrator of the estate. *Merchants Bank v. Monteith*, 334.

See HUSBAND AND WIFE, 3—INSURANCE.

### INSURANCE.

*Trustee for infants — Insurance moneys—Security—*47 Vic. ch. 20, (O.)—An order having been made under 47 Vic. ch. 20, sec. 12, (O), for the appointment of a trustee to receive insurance moneys to which infants were entitled, the Master in Ordinary named a person as trustee; and required him to give security in double the amount to be received.

On an *ex parte* appeal the direction of the Master that security should be given was affirmed, and

*Held*, that it would be contrary to the uniform practice of the Court to appoint any one as the custodian of infants' money, whether as trustee or guardian, without requiring security for the proper discharge of his duties. *Re Thin*, 490.

See CORPORATIONS, 1—HUSBAND AND WIFE, 4.

### INTEREST.

See JUDGMENT, 3, 10—LEGATEE—MORTGAGE, 1.

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### INTERIM ALIMONY.

*Interim Alimony.*]—*Held*, that the principle which underlies all the decisions is, that the allotment of alimony *pendente lite* depends upon the marital relationship of the parties existing *de facto*.

The Court exercises a discretion in granting or withholding alimony *pendente lite* which is regulated by the circumstances of each case. And the defendant in this action by his own act and conduct having clothed the plaintiff with the reputation of being his wife, although he denied the marriage, the decision of the Master awarding *interim* alimony was not interfered with. *Walker v. Walker*, 633.

### INTERPLEADER.

1. *Interpleader — Sheriff.*] — S. placed an execution in the sheriff's hands on the 11th December, and A. one on the 12th December. On the 20th December the landlord put in a claim for rent. The sale took place on the 21st, and the sum of \$1,707.06 was realized. On the 24th one H. notified the sheriff that he claimed all the money in his hands, and not to pay any over to anyone else. On the 27th December the sheriff paid S. in full and took a bond of indemnity from him.

*Held*, that the sheriff was not entitled to an interpleader against H. and the landlord. *Adams v. Blackwell*, 168.

2. *Interpleader—Sale of goods before application.*]—The sheriff having seized goods of much greater value than the amount of plaintiff's execution, which were claimed by a third party, received from the claimant the

amount due on the execution in cash, and withdrew from the seizure.

*Held*, that the sheriff had not thereby disentitled himself to relief by interpleader. *Paris Manufacturing Company v. Walls*, 138.

3. *Interpleader—Issues.*]—Upon an interpleader application by the sheriff of York there were two execution creditors, viz., the Merchants Bank of Canada and one James Walsh, and three claimants, viz., one Clarkson, the assignee of the execution debtor for the general benefit of creditors, the Imperial Bank of Canada, and the Standard Bank of Canada, both claiming under warehouse receipts. The Master in Chambers directed the trial of four issues, viz., (1) The Merchants Bank and Clarkson, plaintiffs, against the Imperial Bank, defendants; (2) the Standard Bank, plaintiffs, against the Merchants Bank and Clarkson, defendants; (3) the Standard Bank, plaintiffs, against the Imperial Bank, defendants; (4) the Merchants Bank plaintiffs, against James Walsh, defendant, (as to priority of execution.)

WILSON, C. J., varied the order of the Master by substituting for the above first three issues a single issue, viz., the Merchants Bank, plaintiffs, v. the Imperial Bank, Standard Bank, and Clarkson, defendants. *Merchants Bank v. Herson*, 117.

4. *Interpleader issue—Attaching creditors.*]—The Master in Chambers made an order directing an interpleader issue to be tried between the plaintiff and certain attaching creditors as to the validity of the plaintiff's judgment and execution.

*Held*, that the issue directed was warranted by sec. 10 of R. S. O. ch. 54 (the Interpleader Act.)

The order provided for the trial of the question of the validity of the plaintiff's judgment as against creditors generally, and also provided that on the trial of the issue it should be open to the attaching creditors to shew that the plaintiff's judgment was void as against the attaching creditors for fraud, or as being a preference.

*Held*, that these provisions were warranted by sec. 3, R. S. O. ch. 54. *Leech v. Williamson*, 226.

5. *Interpleader—Sheriff.*]—A mortgagee under a mortgage which from certain irregularities in it, was void against subsequent mortgagees or purchasers in good faith for value, took possession of the chattels mentioned in it, and secreted them.

An execution was afterwards issued, and the sheriff endeavoured but was unable to seize the goods. It was alleged, and not contradicted, that the execution creditor and defendant were colluding to defeat the mortgagee's claim.

*Held*, that the sheriff was not entitled to an interpleader.

Where a sheriff intends to take goods under an execution the Court has jurisdiction to grant him an interpleader, but this jurisdiction will be rarely exercised, and never unless it is shown that the property or possession in the goods is in the defendant. *Ogden v. Craig*, 378.

6. *Final interpleader order—Sheriff's costs.*]—On appeal by a sheriff from the order of the Master in Chambers striking out so much of a former order as awarded the sheriff his costs of appearing on a motion made by the claimant, in an interpleader for a final order barring the execution creditor for default in giv-

ing security for costs, as directed by the order granting the interpleader.

*Held*, that the sheriff was properly served with notice of such motion, and was entitled to his costs thereof. *Gray v. Alexander*, 358.

7. *Interpleader—Sheriff—Security for costs—R. S. O. ch. 54, sec. 10.*]—Sec. 10 of the Interpleader Act, R. S. O. ch. 54, does not place a sheriff in a more advantageous position than an ordinary suitor, and the fact that a claimant is a married woman, and in financial straits, is not a ground for ordering security for the sheriff's costs. *Sweetman v. Morrison*, 446.

8. *Interpleader by sheriff—Fi. fa. goods—Stock—R. S. O. chs. 54-56.*]—Shares of the stock of an incorporated company may be seized and sold under the Execution Act, R. S. O. ch. 66, by a sheriff under a *fi. fa.* goods, and he is entitled to an interpleader under sec. 10 of the Interpleader Act, R. S. O. ch. 54, where an adverse claim to the stock is advanced.

The trial of the issue was, however, stayed until after the trial of an action between the same parties attacking the conveyance from the judgment debtor. *Brown v. Nelson*, 421.

9. *Interpleader—Costs—Special directions to sheriff—Adverse claim—Scandalous matter in affidavits.*]—When a writ of *fi. fa.* goods is placed in a sheriff's hands, and special directions are given to him to seize particular goods, though not in contemplation of an adverse claim, if the execution creditor abandons after interpleader proceedings have been taken, he must pay the sheriff's and claimant's costs.

Where the special directions were sworn to on one side and denied on the other, it was held that the sheriff must be assumed to have acted only under the writ, without such directions, and an appeal from the Master's order refusing costs to the sheriff was dismissed, but without costs, as the affidavit in denial contained impertinent and scandalous matter. *Vanstaden v. Vanstaden*, 428.

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## INTEREST.

*See* JUDGMENT, 3, 10.

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## INTERROGATORIES.

*Interrogatories—Leading questions—Master's office.*]—The rules of evidence as to leading questions at a trial cannot be strictly applied to interrogatories administered under a foreign commission in the Master's office.

A party to the suit who, in bringing in his account into the Master's office, files an affidavit verifying it may be asked: "Is the account in the schedule to your affidavit correct?" thus leaving it to the other side to cross-examine, instead of beating about the bush as to each particular item in order to avoid leading questions.

An application to strike out objectionable interrogatories may be made before the issue of the commission to take evidence. *Lockwood v. Bew*, 655.

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## ISSUE.

*See* NOTICE OF TRIAL, 4.



## JUDGMENT.

1. *Appeal—Money Demand—Endorsement—Judgment—Rule 80 O. J. A.*—A writ was endorsed specially for \$910, the amount of a bill of exchange, and also asked to have certain conveyances, &c., set aside as fraudulent.

The Master in Chambers made an order for judgment under Rule 80, on January 11th.

PROUDFOOT, J., on an *ex parte* application of the defendant for leave to bring on an appeal from the Master's order on the 17th January, directed the appeal to be set down for Monday, January 21st.

*Held*, that the appeal was properly brought.

*Held*, also, that an order, for judgment under Rule 80 cannot be made except in an action where the plaintiff merely seeks to recover a debt or liquidated demand in money. *Standard Bank v. Wills*, 159.

2. *Judgment—Rule 270 O. J. A.*—The plaintiff not appearing at the trial, which took place at the Picton Assizes, before Patterson, J. A., judgment was directed to be entered for the defendant, with costs.

Application was subsequently made to the Judge at the same Assizes to set aside the judgment and reinstate the case on the list. This was refused, the plaintiff not being then ready to go on. Application was then made by the plaintiff to the Master in Chambers under Rule 270 O. J. A., to set aside the judgment entered at the trial. This motion was enlarged before Rose, J., in Chambers, who

*Held*, that Rule 270, O. J. A., does not give jurisdiction to the Master or a Judge in Chambers in such cases. *Hilliard v. Arthur*, 281.—Affirmed on appeal, 426.

3. *Judgment—Interest—Rule 326, O. J. A.*—On the 23rd January, 1882, the following judgment was pronounced in Court by OSLER, J. A.:—"I direct judgment to be entered for the plaintiff against the within named defendants after the fifth day of next Hilary Sittings, for \$100-000."

Hilary Sittings ended on the 25th February, and judgment was formally entered with the Clerk of the Court on the 24th March as of the 23rd January.

*Held*, that Rule 326 did not apply to this case: that the judgment should be dated on the day of its entry with the clerk, and from that date only, under Rule 327, interest should run.

*Keleher v. McGibbon*, 10 P. R. 89, explained.

*Held*, also, on the facts stated in the special case, that the plaintiff and defendants should each pay their own costs of the interpleader, and each one moiety of the costs of the railway company and of the sheriff. *McLaren v. Canada Central Railway Company*, 328.

4. *Judgment—Settling minutes—Rule 416, O. J. A.*—The entry of judgment, the minutes of which have been settled by a local registrar, does not preclude a party who at the time of such settling has given notice that he desires the minutes settled at Toronto, from afterwards obtaining a reference under Rule 416, O. J. A.

The Court will rather encourage (at all events for some time) the settling of judgments such as are not included in the forms, at the head office, because of the well-understood phraseology in use by the two officers whose function it is to frame the



terms of such judgments. *Holden v. Smith*, 369.

5. *Judgment—Rule 324, O. J. A.—Covenants—Unascertained amount.*]

—Leave was given to the plaintiff under rule 324, O. J. A., to sign final judgment, where the claim was upon a covenant by the defendant with the plaintiff to pay certain mortgages made by the the plaintiff upon lands sold by him to the defendant, and for indemnity, and where the plaintiff was being sued for payment of four of the mortgages, but had not actually paid them.

It was directed that the judgment to be entered should be for the amount of the four mortgages and interest, (to be computed by the registrar) and costs.

Leave was reserved to the defendant to apply to be relieved from the judgment upon his satisfying the claim of the holder of the mortgages. *Clendennan v. Grant*, 593.

6. *Judgment—Foreign corporation—Liquidation—Rule 80, O. J. A.*]

Leave was given to sign final judgment under Rule 80, O. J. A., against a company incorporated in England, having its head office there, and in process of liquidation there, but doing business and having assets and liabilities in Ontario. *Plummer v. Lake Superior Native Copper Co.*, 527.

7. *Action for recovery of land—Judgment—Rule 322, O. J. A.*]

In an action for the recovery of land the plaintiffs moved under Rule 322 O. J. A., for final judgment upon the pleadings, the depositions of the defendant, taken on his examination for discovery, and upon an affidavit verifying a lease of the land in question to the father and brother of the defendant.

*Held*, affirming the decision of the Master-in-Chambers, that much care must be taken in such cases not to take away the right of trial on vivâ voce evidence; and that as the plaintiffs' case was not conclusively made out, the motion was properly refused.

*Quære*, whether the lease in question was a document that under Rule 322, O. J. A., could be proved on this motion by an adverse affidavit without cross examination. *Cook et al. v. Lemieux*, 577.

8. *Judgment—Rule 80, O. J. A.*]

On a motion for judgment under Rule 80, O. J. A., in an action on a promissory note the defendant filed an affidavit showing that he was an accommodation maker and stating his information and belief to be, that the plaintiffs were aware of the fact, that they held the note as collateral security, and that they never gave any value for it, and further that since the making of the note M., the payee, had become insolvent and made an assignment and that there was litigation pending between the plaintiffs and his assignee in respect to certain securities alleged to be held by the plaintiffs on account of his indebtedness. An affidavit of the plaintiffs' manager in reply was filed, denying knowledge of the note being an accommodation one, and stating that it was discounted by the plaintiffs and the proceeds placed to M.'s credit.

*Held*, not a case in which judgment could be ordered. *Hughson et al. v. Gordon*, 565.

9. *Judgment—Rule 80, O. J. A.—Notice of protest—Address.*]

In an action against the maker and endorsers of a promissory note, in answer to a motion under Rule 80, O. J. A., for judgment, the defendants, the

endorsers of the note, who it was said were accommodation endorsers, swore that they had received no notice of dishonour. The protest of the note was not produced by the plaintiffs on the first return of the motion.

*Held*, (on appeal from the Master in Chambers who ordered judgment,) that as there was no evidence that the defendants had received notice of dishonour, and a distinct denial by them of such notice, the motion should have been refused.

The protest having been produced after an enlargement.

*Held*, that being only presumptive evidence of the posting of the notices, it was not sufficient in the face of the denial.

The note was dated "Prince Arthur's Landing," and since the making of the note the place so called was incorporated under the name of Port Arthur, the limits of the two places not exactly corresponding. One of the endorsers, C.C.B., resided at Bowmanville.

*Held*, that the sufficiency of a notice addressed to C. C. B. at Port Arthur, was open to argument, upon which the defendant was entitled to have a trial, and on this ground judgment should not have been ordered. *Ontario Bank v. Burke et al.*, 561.

10. *Entry of Judgment—Interest—Rules 326 & 351, O. J. A.*—In endorsing a writ of execution to levy interest upon the amount of the judgment, the interest is to be computed from the day of pronouncing the judgment, not from the day of the formal entry thereof.

Rules 326 & 351, O.J.A., are not inconsistent. *Keleher v. McGibbon*, 89.

*See* ENDORSEMENT—EXECUTORS—HUSBAND AND WIFE, 3—LOCAL MASTER, 1—MARRIED WOMAN, 1, 2, 3, 4—NEW TRIAL—PROHIBITION, 4—SECURITY FOR COSTS, 1—TENANTS IN COMMON—TENDER.

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## JUDGMENT DEBTOR.

*See* EXAMINATION, 1.

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## JURISDICTION.

*See* ABSCONDING DEBTOR—ADMINISTRATION, 1, 5—CORPORATIONS, 2, 3—COSTS, 13—DIVISION COURT, 1, 2, 3—DOWER, 1—HUSBAND AND WIFE, 3, 4—JUDGMENT, 2—LOCAL JUDGE—LOCAL MASTER, 1, 2—PROHIBITION, 2, 3, 4, 5—REFERENCE, 2—REGISTRAR OF DIVISIONAL COURT—SERVICE—TRIAL, 4—VENDOR AND PURCHASER, 2.

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## JURY NOTICE.

1. *Jury notice—Chancery Division.* The action was brought in the Chancery Division to obtain specific performance of a covenant to repair, or for damages.

*Held*, that it was really a common law action, for specific performance of such a covenant could not be decreed, and the defendant was therefore entitled to the benefit of his jury notice. *Bingham v. Warner*, 621.

2. *Jury notice—Omission to file—Effect of—Costs—Notice—Rule 406, O. J. A.*—The plaintiff omitted to file a jury notice with his last pleading, and applied *ex parte* to the Master-in-Chambers for leave to with-

draw the last pleading and re-file it with a jury notice. The leave was granted.

*Held*, on appeal, that when the plaintiff came to the Court to be relieved from his slip, he should have been called upon to shew that the case was one which should be tried by a jury, and that unless he had been able to do so the defendants should not have had their statutory right to have the case tried by a Judge without a jury taken away.

*Held*, also, that notice of the motion should have been given to the defendant. in accordance with the spirit of Rule 406, O. J. A.

The appeal was treated as a substantive motion for leave to file the jury notice, and the order of the Master was affirmed, without costs. *Powell v. City of London Assurance Co. Powell v. Quebec Insurance Co.*, 520.

3. *Action in Chancery Division—Jury notice—Transferring action.*]—Since Rule 545, O. J. A., an action is not to be transferred from one Division of the High Court of Justice to another, except on very strong grounds.

In an action for the recovery of land, in which the writ issued from the Chancery Division, the jury notice served by the defendants was struck out, and a motion to transfer the action to another Division was refused.

*Bank of British North America v. Eddy*, 9 P. R. 468, does not since Rule 545, O. J. A., afford any general rule of practice. *Masse v. Masse*, 574.

## LEADING QUESTIONS.

*See* INTERROGATORIES.

### LEGACY.

*See* WILL, 2.

### LEGATEE.

*Execution—Statute of Limitations—Interest—Evidence.*]—One of two executors and co-residuary legatees got in portions of the residuary estate, and as to such his estate was held liable as for a legacy to the other residuary legatee, 19 Can. L. J. 95. Some of the moneys so got in were re-invested, and afterwards came again into the hands of such co-residuary legatee in administering the estate.

*Held*, as to the latter moneys, the relationship of debtor and creditor applied, but that by reason of the Statute of Limitations the account could not extend further back than six years.

Some of the residuary estate consisted of lands, which the co-residuary legatee as tenant in common occupied, or got in the rent and profits of.

*Held*, (1) that the account extended only to whatever had been paid or given by tenants or occupants of the joint property more than the co-tenant's just share or proportion. (2) That such co-tenant was not liable for the profits or produce taken by him from the common property, nor for his enjoyment of such property when there was no exclusion or ouster. (3) That the six years' bar of the Statute of Limitations applied to such claim.

It is not usual to allow interest on claims where there is no fraud, or wilful withholding of accounts,

## LANDLORD AND TENANT.

*See* CORPORATIONS, 7.

only a loose mode of dealing between the parties. The discretion under which a jury may allow interest applies to the Master's office.

A claim by the next of kin of a deceased legatee, cannot be adjudicated upon in the absence of a personal representative of such legatee. But where entries had been made in the executor's books giving credit to such next of kin, for portions of such deceased legatee's share, such entries were held to be evidence of the relationship between debtor and creditor between such executor and next of kin, and could be read without entering into the consideration of the origin of the indebtedness. *Re Kirkpatrick—Kirkpatrick v. Stevenson*, 4.

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### LEVY.

*See* CREDITORS' RELIEF ACT, 1880.

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### LEX LOCI CONTRACTUS.

*See* CORPORATIONS, 1.

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### LIBEL.

*Libel—Particulars—Striking out—Trial.*—Particulars in an action for libel cannot be struck out as insufficient; if those delivered are too general, the Judge at the trial will exercise his discretion as to the admission of evidence thereunder. *Citizens Ins. Co. v. Campbell*, 129.

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### LIFE ESTATE.

*See* WILL, 1.

### LIEN.

*Solicitor's lien for costs.*—By the terms of the judgment pronounced at the trial costs up to the hearing were to be paid to the plaintiff out of the fund in Court, a reference was directed to take the accounts, and further directions and subsequent costs were reserved.

The report of the officer to whom the reference was directed found the plaintiff indebted to the estate in a considerable amount, and a motion was made by the defendant Moffatt (pending an appeal from the report) to stay payment out of Court of the costs of the plaintiff up to the trial until after the hearing on further directions, in order that the amount found due to the estate by the plaintiff might be set off *pro tanto* against the costs awarded to the plaintiff.

*Held*, that the judgment pronounced at the trial gave the plaintiff and his solicitor a vested right to be paid out of the fund in Court prior to the defendant's equity to ask a set-off, and no set-off should be allowed to the prejudice of the solicitor's lien thus arising.

A solicitor's lien having been asserted at the bar during the argument, an affidavit proving it was allowed to be put in subsequently, following the suggestion of Strong, V. C., in *Webb v. McArthur*, 4 Ch. Chamb. R. 63. *Dawson v. Moffatt*, 366.

*See* MORTGAGE, 3.

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### LIQUIDATOR.

*See* CORPORATIONS, 7.



### LIS PENDENS.

*Lis pendens* — *Vacating same* — *Endorsement on writ.* — A *lis pendens* should not be vacated unless it appears from the endorsement on the writ or the pleadings that the claim upon the land is not an appropriate remedy. There should be clear and almost demonstrative proof that the writ is an abuse of the process of the Court.

*Jameson v. Lang*, 7 P. R. 404, approved of.

When a plaintiff seeks to register a *lis pendens* he should be more precise in respect to the endorsement on his writ than in ordinary cases, and should define generally the grounds of his claiming an interest in the lands. *Sheppard v. Kennedy*, 242.

See APPEARANCE.

### LOCAL JUDGE.

*Local Judge of High Court—Jurisdiction—Rescinding orders.* — The plaintiff's solicitors lived at Sandwich, and the defendant's solicitors at Toronto.

The local Judge at Sandwich in November, 1884, made an *ex parte* order for leave to the plaintiff to amend the writ of summons before service, and subsequently set aside his own order on the defendant's application, on notice to the plaintiff and after argument by counsel on behalf of both parties.

The plaintiff appealed from the second order to a Judge in Chambers at Toronto.

*Held*, that the local Judge had no power to make the rescinding order under Rule 422, O. J. A.

Subsequently the defendants made a substantive motion before the same

Judge in Chambers at Toronto, to set aside the original order of the local Judge.

*Held*, that save as excepted, a local Judge of the High Court in proceedings in the High Court having the same power in Chambers as a Judge of the High Court in Chambers as to the matters referred to in the Judicature Act Rules, he is a Judge of co-ordinate jurisdiction with a Judge of the High Court in Chambers. A Judge of the High Court has, therefore, no power to review the decision of a local Judge, save by way of appeal in the manner provided by the Judicature Act Rules; and that this motion could not be treated as an appeal as it was too late under Rule 427, O. J. A. *Ryan v. Canada Southern R. W. Co.*, 535.

See EXAMINATION, 7—SERVICE.

### LOCAL MASTER.

1. *Local Master—Jurisdiction of—Judgment* — Rules 80, 422, O. J. A.]—Rule 422, O. J. A., and its subsection (a) must be read together, and hence the limitation in the subsection of the jurisdiction of the County Judge in certain cases curtails that of local Masters in similar cases.

The local Master at Hamilton in the county of Wentworth, gave leave to sign final judgment under Rule 80, O. J. A., in an action in which the solicitor for the defendant had his place of residence and office at St. Catharines, in the county of Lincoln, and no office in Hamilton.

*Held*, that under Rule 422, O. J. A., the local Master had no jurisdiction to make the order. *Freel v. Macdonald*, 170.



2. *Local Master—Jurisdiction.*]—The plaintiff, as mortgagee of the defendants by an instrument dated January 30th, 1883, purporting to be duly executed by the plaintiff, commenced an action for the sale of the mortgaged property. The writ issued duly indorsed under Rule 17, O. J. A., and default being made, judgment was obtained under Rule 78, O. J. A., referring it to the Master at Lindsay to make and take the inquiries and accounts as prescribed by G. O. Chy. 441 (form 168, O. J. A.)

The Master gave certain execution creditors who had been made parties in his office and proved their claims, priority over the plaintiff on the ground that the instrument in question was invalid, the terms of sec. 85 of the Canada Joint Stock Companies' Act of 1877, which require the sanction of a two-thirds vote of the shareholders not having been complied with.

*Held*, that under the decree the Master had no power to adjudicate upon the validity of the instrument in question as a mortgage, and the execution creditors not having moved against the judgment by virtue of which they were made parties were also bound by the decree. *McDougall v. Lindsay Paper Mill Company*, 247.

See REFERENCE, 3—SHERIFF, 2.

## LUNACY.

See HUSBAND AND WIFE, 2.

## MANDAMUS.

*Mandamus — Attachment?*—*Sequestration.*]—Attachment not se-

questration is the proper remedy for disobeying a mandamus.

A writ of mandamus was directed to the Midland Railway Company, and was served on the president.

Attachment against the president for disobedience of the writ was refused, because it appeared that he could not by himself and without a majority of the board of directors perform the act required by the writ, and the other directors had not been served; but *Held*, that the mandamus was properly directed to the Company. *Demorest v. Midland R. W. Co.*, 82.

See MUNICIPAL COUNCIL — RAILWAY COMPANY.

## MARRIED WOMAN.

1. *Judgment—Married woman—Setting aside—Time.*]—The original process in the action was served upon the defendant, the married woman, personally; she swore that she handed it to her husband, but never authorized any one to act for her as solicitor. She was not proceeded against as a married woman. D., an attorney, appeared for her and her husband and judgment was signed against both defendants by consent of D. as her attorney, on an order made in Chambers in 1875. Execution was at once issued under the judgment, and the personal property of the female defendant was seized and sold by the sheriff without complaint from her. It appeared that at the time of the commencement of the suit the married woman had an interest in certain real estate which she and her husband conveyed away after action brought and before judgment.

No affidavit from the male defendant nor from D., the attorney, was filed.

*Held*, that after the long lapse of time and under the circumstances shewn the judgment should not be set aside. *McLean v. Smith et al.*, 145.

2. *Judgment—Rule 80 O. J. A.—Married Women's Property Act, 1884.*—Judgment was granted under Rule 80, O. J. A., in an action on a promissory note against one of the defendants, a married woman, where the marriage and the maturity of the note were before the Married Women's Property Act 1884, (47 Vic. ch. 19, O.), following *Bursill v. Tanner*, 13 Q. B. D. 691. *Cameron v. Rutherford et al.*, 620.

3. *Judgment—Rule 80, O. J. A.—Married Women's Property Act, 1884.*—Judgment was granted under Rule 80, O. J. A., in an action on a promissory note against one of the defendants, a married woman, as indorser, where the note matured after the passing of the Married Women's Property Act, 1884 (47 Vic. ch. 19, O.), and where there was no allegation that the married woman was possessed of separate estate.

The order provided that the judgment should be levied out of the defendant's separate property (if any) which she was possessed of or entitled to at the time of the making of the note, or which she may thereafter acquire or have acquired, and which she was not restrained from anticipating. *The Quebec Bank v. Radford et al.*, 619.

4. *Married woman—Judgment—Rule 80, O. J. A.*—Judgment may be obtained against a married woman

under Rule 80, O. J. A., but execution thereunder must issue against her separate estate only. *Kinnear v. Blue*, 465.

5. *Married women—Next friend—Rules 97 and 494, O. J. A.*—Where a decree was made in June, 1881, two months before the O. J. A. came into force, and an order was made on the 29th October, 1883, staying proceedings until a new next friend was appointed to the married women plaintiffs, who sued in respect of their separate estate.

*Held*, that the order was right, for although Rule 97, O. J. A., says that married women may sue without a next friend in regard to their separate estate, yet R. 494, O. J. A., in effect says they shall not do so where a decree has been obtained before the O. J. A. came into force. *Webster v. Leys*, 86.

See INTERPLEADER, 7.

## MASTER IN CHAMBERS.

See ABSCONDING DEBTOR — ADMINISTRATION, 5 — CORPORATIONS, 3 — DOWER, 1 — JUDGMENT, 2 — REFERENCE, 2, 3 — TRIAL, 4.

## MASTER IN ORDINARY.

See ADMINISTRATION, 1, 5 — CORPORATIONS, 2 — HUSBAND AND WIFE, 3, 4 — VENDOR AND PURCHASER, 2.

## MINUTES OF JUDGMENT.

See JUDGMENT, 4.

## MISTAKE.

*See IMPROVEMENTS UNDER MISTAKE OF TITLE—REPORT.*

## MORTGAGE.

1. *Mortgage—Taking account in M. O.—Collateral security—Statute of Limitations—Arrears of interest—Pleading.*—On a reference to take accounts in a mortgage case it is not open to the defendants to contend that the original loan was *ultra vires*; nor can any defence be raised in the Master's Office which, if allowed, might result in determining that the Court had made a nugatory order of reference.

When certain securities had been assigned as collateral for the payment of a promissory note of \$1,000, which note was partly paid and a new note given, such securities may be held until the debt is discharged by payment.

Though the remedy of a creditor to recover a debt be barred by the Statute of Limitations, he may hold the collateral securities for such debt until paid.

Where no claim for arrears of interest is specially made by the pleadings, and where there is no covenant to pay interest, only six years' arrears can be recovered. *Wiley v. Ledyard*, 182.

2. *Action on covenant in mortgage—Setting aside service of writ—Ontario Mortgage Act, 1884.*—The plaintiff gave to the defendant a notice of sale under the power of sale in a certain mortgage, and also began an action against the defendant upon the covenant for payment contained in the same mortgage.

The notice of sale was dated 2nd May, the writ was issued on the 3rd

May, and both were served on the defendant on the 3rd May. No order was obtained permitting the action to be commenced. Upon motion to set aside the service of the writ as contrary to the provisions of the Ontario Mortgage Act, 1884, 47 Vict. ch. 16, (O.)

*Held*, that the object of the statute is to prevent all other proceedings while the notice of sale is running, and it is not necessary under the statute, to fulfil the very words of it, that one of the acts should be prior to the other.

Service of writ set aside with costs. *Perry v. Perry*, 275.

3. *Liens on real estate—Registry Act—Mortgagee's claims.*—Under a judgment for redemption obtained by an execution creditor of the mortgagor, the mortgagee who held the title under a deed absolute in form, brought into the Master's office with his account certain orders signed by the mortgagor, directing him to pay to the parties named in them, any surplus moneys in his hands after paying his mortgage. The mortgagee did not accept them, but entered them in his real estate ledger, and they were not registered.

*Held*, (1), That such mortgagee could not claim to be allowed these orders in addition to his mortgage, not having accepted or paid them; nor could he be looked upon as a trustee holding the lands in trust for the holders of such orders. (2) That the orders operated as equitable charges or liens on the mortgagor's interest in the lands, prior to the receipt by the sheriff of the plaintiffs' *fi. fa.* lands, and that such lien holders should be made parties in the Master's office, and prove their claims in their own right. *Canadian Bank of Commerce v. Forbes*, 442.

See COSTS, 9.

## MORTGAGOR AND MORTGAGEE.

See COSTS, 1—JUDGMENT, 5.

## MOTION.

See EXAMINATION, 5.

## MOTION TO DISMISS.

*Dismissing action—Want of prosecution.*—*Held*, that the filing of a statement of claim and an undertaking to speed is not a sufficient answer to a motion to dismiss. The delay must be sufficiently explained. In this case, being an action for a large claim against sureties, the plaintiffs not having in the opinion of the Court sufficiently explained, offered excuse for a delay of nearly two years, or shewn a probability of proceeding speedily, the action was dismissed with costs. *Napanee, Tamworth, and Quebec R. W. Co. v. McDonell, et al.*, 525.

## MOTION FOR JUDGMENT.

*Motion for judgment—Notice*—*G. O. Chy.* 418—*Rule 407, O. J. A.*—*G. O. Chy.* 418 is controlled by the conflicting provisions of *Rule 407, O. J. A.*, hence two clear days' notice of motion for judgment under *Rule 324, O. J. A.*, is sufficient. *Martens v. Birney*, 368.

## MUNICIPAL COUNCIL.

*Municipal law—Opening — Road allowance—Mandamus.*—It is discre-

tionary with and not obligatory upon a municipal council to open a road allowance, and the fact that a by-law has been passed does not create such an obligation, and a mandamus was refused. *Re Wilson v. Wainfleet*, 147.

## NECESSARIES.

See HUSBAND AND WIFE, 2.

## NEW TRIAL.

*Judgment — Setting aside — New trial*—*Rule 270, O. J. A.*—Where judgment for defendant was given at a trial in consequence of the plaintiff's absence, and an application was afterwards made to the Judge at the sittings to reinstate the case, which he refused to entertain.

*Held*, that the plaintiff might nevertheless apply under *Rule 270, O. J. A.*, to the Divisional Court at its next sittings to set aside the judgment and for a new trial. *Wilson v. Irwin*, 598.

See JUDGMENT, 2.

## NEXT FRIEND.

See MARRIED WOMAN, 5.

## NOTICE.

See APPEAL, 2, 3—JURY NOTICE, 2—MOTION FOR JUDGMENT—VENDOR AND PURCHASER, 1.

## NOTICE OF SALE.

See MORTGAGE, 2.



## NOTICE T.

See SECURITY FOR COSTS, 6.

## NOTICE OF TRIAL.

1. *Notice of trial—Service—Leaving copy in office of defendant's solicitor.*—Service of notice of trial effected by leaving a copy of the same in the office of the defendant's solicitor before six o'clock, but after the solicitor and his clerks had left for the day, takes effect only from the time when the notice came to the knowledge of the solicitor.

The practice laid down in *Consumers' Gas Co. v. Kissock*, 5 U. C. R. 542; *McCallum v. Provincial Ins. Co.*, 6 P. R. 101, held not to have been altered by the O. J. A. as to service upon a defendant's solicitor. *Davies v. Hubbard*, 148.

2. *Notice of trial—Revivor.*—The original defendant dying *pendente lite*, the plaintiffs issued an order of revivor on the 22nd April, and served it on the defendants by order on the same day, and along with it a notice of trial for the 5th May, at Cornwall.

The defendant moved to set aside the notice of trial as irregular.

*Held*, that the order of revivor was in force from its service, and as it would be confirmed by the lapse of twelve days upon the 4th of May, the notice of trial for the 5th of May was regular. *New York Piano Co. v. Stevenson*, 270.

3. *Short notice of trial—Rule 455 O. J. A.—Holiday excluded in computing time.*—Sundays and holidays are excluded in computing the five days' notice necessary in short notice of trial.

Short notice of trial served on Wednesday for Monday.

*Held*, bad. *O'Donnell v. O'Donnell*, 264.

4. *Notice of trial—Joinder of issue.*—The reply in this action contained two paragraphs, the first denying certain allegations in the fourth paragraph of the defence, and the second joining issue upon the rest of the defence.

Notice of trial was served with the reply.

A motion to set aside the notice of trial was dismissed, because the affidavit filed in support of it did not state that no joinder was filed when the notice of trial was given.

*Semble*, the joinder of issue referred to in Rule 176 O. J. A., is not a simple denial of a previous pleading. *Weller v. Proctor*, 323.

5. *Notice of trial—Divisions of High Court.*—A notice of trial in an action brought in the Queen's Bench or Common Pleas Division for a special sitting for the trial of actions in the Chancery Division is irregular, and will be set aside. *Grant v. Middleton*, 585.

6. *Postponement of cause—Remanet—Notice of trial.*—When a cause is postponed by the order of a Judge at the Assizes, upon the defendant's application, it is a remanet, and no notice of trial for the next Assizes is necessary, under the rules of 1875, (37 U. C. R. 528) and the O. J. A. *Donovan v. Boulton*, 52.

## OFFICIAL REFEREE.

See REFERENCE, 1.



PARTICULARS.

See EXAMINATION, 9—LIBEL.

PARTITION.

*Partition—Creditors—Inquiry for* —G. O. Chy. 640.] —Sales by the Court of real estate, held in co-tenancy, are governed by the provisions of the Partition Act, R. S. O., ch. 101, and Masters should not, without very special and sufficient reasons, dispense with inquiries and advertisements for creditors holding specific or general liens upon the whole or any undivided share of the estate, but should ascertain and report what incumbrances affect the property or any undivided share thereof down to the time of sale, and not merely at the time when the order under G. O. Chy. 640 is made. *Robson v. Robson*, 324.

PARTIES.

1. *Parties — Partnership — Rule* 100, O. J. A.]—The cause of action arose before, and the writ of summons was issued after, the dissolution of the defendants' firm.

*Held*, that the defendants were properly sued in their firm name. *Wilson v. Roger McLay & Co.*, 355.

2. *Parties — Joinder of defendants.*]—The plaintiff, the owner of a water-lot and boat house abutting on the Ottawa River, who carried on the business of letting boats for hire, brought an action against four saw-mill owners, alleging that they being each the owner of a saw-mill situated higher up on the river than the plaintiff's lot, had each been in the habit of throwing sawdust, slabs,

&c., into the river, and that this waste matter floating down had lodged upon and in front of the plaintiff's water-lot, and had there formed into a solid mass.

*Held*, that the four saw-mill owners were properly joined as defendants in one action. *Rattè v. Booth et al.*, 649.

See EXAMINATION, 3—GARNISHEE.

PARTNER.

See EXAMINATION, 8—Parties, 1—PLEADING.

PATENT.

See EXAMINATION, 9.

PAYMENT INTO COURT.

See COSTS, 5—HUSBAND AND WIFE, 4—SECURITY FOR COSTS, 7—TENDER.

PAYMENT OUT OF COURT.

See SECURITY FOR COSTS, 10.

PENALTY.

See ELECTION, 1.

PERSONAL REPRESENTATIVE.

See ADMINISTRATION, 5.

## PLEADING.

*Partnership—Specially pleading a statute—R. S. O. ch. 133—Rule 141, O. J. A.*—The statement of claim alleged a partnership between the plaintiff and defendant, but did not aver whether the agreement was in writing or not. The defence set up a special agreement by which the defendant was to be remunerated by a share of the profits in lieu of wages or salary, but did not expressly refer to the R. S. O. ch. 133. It was admitted that something was due to defendant, and a reference was ordered.

The Master-in-Ordinary held, following the remarks of Proudfoot J., in *Rogers v. Ullman*, 21 Gr. 139, that as the defendant had not pleaded R. S. O. ch. 133, so as to negative the plaintiff's allegation of a partnership, he could not claim the benefit of that statute to support his account, but to enable him to properly raise the question on appeal, permitted an affidavit to be filed shewing that there was an agreement under the statute.

*Held*, on appeal, that the case did not come within the terms of Rule 141, O. J. A., and that it was not necessary more specifically to plead the statute. *Neil v. Park*, 476.

See COSTS, 4—DOWER, 2—EXECUTORS—HUSBAND AND WIFE, 3.

## PRINCIPAL AND SURETY.

See COSTS, 14.

## PRIORITY.

See TENANTS IN COMMON.

## PRODUCTION.

1. *Trial of issue by County Judge—Production—Rule 373, O. J. A.*—Where, after judgment in an action in the Common Pleas Division, an issue on a garnishee application was directed to be tried under Rule 373, O. J. A., by a County Judge and jury.

*Held*, that such Judge had no jurisdiction to make an order to produce before trial, and consequently no authority to make any order on a failure to produce. *Cochrane v. Morrison*, 606.

2. *Production of documents—Unsent letters.*—In an action to establish a will, which the defendants impeached for want of testamentary capacity, and set up a prior will, the defendant included in his affidavit on production copies of letters from himself to the testatrix, but objected to produce them for inspection on the ground that they were never mailed or sent to their destination. Their materiality and relevancy to the issues was not disputed.

*Held*, that all memoranda and writings, or pieces of paper with writing on, which may throw light on the case, whether they would or would not be evidence *per se*, are subject to production, unless they can be protected; and the mere fact in the case of a letter that it was not forwarded to its destination is no ground of exemption. These letters were therefore ordered to be produced. *Cameron v. Cameron*, 522.

3. *Production—Privileged documents.*—Among the grounds of defence set up in an action to recover the amount of a policy of insurance were, that the plaintiff's books had been falsified; and that the fire had

occurred through the wilful negligence of the plaintiff. The defendants employed two experts to investigate the plaintiff's books and his conduct with respect to the fire, and these experts made reports. The defendants' affidavit on production set out as documents which they objected to produce: "Report of adjuster for Norwich Union Fire Insurance Society for counsel's opinion thereon," "Various memoranda taken by adjuster for preparation of report, and for information of counsel."

It was further stated in the affidavit that these documents were "privileged, being part of the defendants' case and prepared for the instruction of counsel, and prepared specially for this litigation and in contemplation thereof."

*Held*, on appeal, (reversing the decision of the Master in Chambers) that these documents were privileged from production. *Macdonald v. Norwich Union Fire Insurance Co.*, 501.

4. *Examination—Production.*—The proper mode in examinations for discovery, where a witness neglects or refuses to produce, is for the examiner to direct what documents shall be produced and have the examination adjourned for that purpose.

The practice of enabling a party by means of a subpoena *duces tecum* to get production on a two-day notice of any documents he chooses to particularize is not to be encouraged, and a motion to commit for non-production was refused.

It is desirable to postpone examinations for discovery until after production. *Lavery v. Wolfe*, 488.

5. *Foreign commission—Transmission out of jurisdiction of documents to be used thereunder.*—Books and documents produced in an action may, when a proper case is made out, be sent out of the jurisdiction for the purpose of the examination of witnesses before a foreign commission.

But documents produced in another action, which is *sub judice*, will not be taken from the office for such a purpose. *Clarke v. Union Fire Ins. Co.*; *Chabot's Case*, 413.

6. *Affidavit on production—Motion for better affidavit.*—The plaintiff in his affidavit of documents mentioned "other letters and papers filed herein, the particulars of which I cannot now depose to," and stated "that such documents were filed in this Court on the motion made by defendant for his discharge from custody, as I am informed and believe."

*Held*, that the plaintiff's affidavit was sufficient; and that the defendant must inspect the documents at the office where they were filed, or take the necessary steps to have them transmitted to the office of the Court at his own place of abode.

*Held*, also, that an affidavit to shew the incorrectness of the affidavit of documents could not be received, following *Jones v. Monte Video Gas Co.*, 5 Q.B.D. 556. *Lyon v. McKay*, 557.

7. *Affidavit of documents—Material for motion for better affidavit.*—The usual affidavit on production of documents, made by an officer of the defendants, contained a statement that the defendants objected to produce their repairs book and train register, but that they would produce such portions of the books

"as are relevant, for inspection at the offices of the company ;" and a further statement that the company had "sealed up such parts of the said books as do not relate to the matters in question in this action." At the trial the plaintiffs called as witnesses the train despatcher, locomotive engineer, and an engine driver of the defendants. The presiding Judge refused on the evidence then given to direct the books to be unsealed.

*Held*, that the evidence taken at the trial was not proper material upon which to make an order in Chambers for a better affidavit on production.

*Held*, also, that as such evidence did not satisfy the Judge at the trial that he should direct the books to be unsealed, a Master or Judge in Chambers should not have been called upon to pass an opinion on the same evidence to accomplish what the plaintiff at the trial failed to do.

*Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556, considered. *Moxley v. Canada Atlantic Railway Co.*, 553.

8. *Production of Documents—Delivery out after inspection.*]—The object of the production of documents in actions, is to enable either party to discover the existence and acquire a knowledge of the contents of the deeds and writings relevant to the case: and when that object is accomplished the documents will go back to the custody of the party producing them.

The Master has a discretion to direct parties to leave documents in his office so long as any useful purpose may be answered by their remaining there, and then to allow the

party producing them to take them back. *Darling v. Darling*, 1.

See AFFIDAVIT ON PRODUCTION.

## PROHIBITION.

1. *Prohibition—Division Court—Cause of action.*]—The plaintiff lived in Ottawa, and the defendant corporation had its head office at Hamilton. The plaintiff made a mortgage to the defendants, and a dispute arising between the plaintiff and the defendants as to the amount of interest to be paid thereon, the defendants claimed the full interest according to the mortgage, and desired the plaintiff to remit it by mail to their office at Hamilton, which the plaintiff refused to do. The defendants then began proceedings under the power of sale contained in their mortgage, and also an action for the recovery of the land, whereupon the plaintiff paid the money to his solicitors in Ottawa, and the latter sent it under protest to the defendants' solicitors in Hamilton, who in turn paid it to the defendants in Hamilton. On an action brought in the Division Court in Ottawa for the recovery of the money so paid under protest.

*Held*, that when the plaintiff made the payment by reason of the action against him the defendants' former direction to pay by deposit of the money in the Ottawa P. O. was superseded; and that the payment having been made by the plaintiff in Hamilton, the whole cause of action did not therefore arise at Ottawa. *Garland v. The Omnium Securities Co.*, 135.

2. *Division Court—Prohibition—Increased jurisdiction—Excess over*



\$200—42 *Vic. ch. 8. (O).*]— In an action in the Ninth Division Court of the County of Hastings, on a promissory note for \$200 and interest, the learned Judge who tried the case (the Junior Judge of the county) entered judgment for \$200, the amount of the note, \$7.17 accrued interest and costs.

*Held*, on a motion for prohibition, that the wording of the statute is clear, namely, "all claims for the recovery of debt or money demand the amount or balance of which does not exceed \$200," and the motion was granted: *McCracken v. Creswick*, 8 P. R. 501, and *Widmeyer v. McMahon et al.*, 32 C. P. 187, referred to and distinguished.

*Held*, also, that as the learned Judge who tried the case does not allow County Court costs in similar cases, and as the plaintiff was obliged to sue in the Division Court at the risk of prohibition, or in the County Court, and lose his costs, that the defendant should get no costs of this motion, unless he successfully resists the suit to be subsequently brought to recover the amount of the note. *Re Young v. Morden*, 276.

3. *Division Court jurisdiction—Prohibition—Discretion.*]—A. entered a notice disputing plaintiff's claim in a Division Court suit, and objecting to the jurisdiction of the Court, but did not appear at the trial when the Junior Judge of the county of York, upon proof of the plaintiff's claim, and such facts as in the absence of proof to the contrary established a *prima facie* case of jurisdiction entered a judgment in favour of the plaintiff for \$44.75. On motion for prohibition on the ground of want of jurisdiction.

*Held*, following *Archibald v. Bruckey*, 7 P. R. 304, that the granting

of prohibition under the circumstances was discretionary: that it would be unfair to place upon the Judge trying the case the burden of cross-examining the witnesses to ascertain jurisdiction: that if a *prima facie* case of jurisdiction is made out the defendant is himself to blame if it is not displaced: and as neither a good defence on the merits was shewn, nor dispatch used in making the application, the motion was refused with costs. *Friendly v. Needler*, 267,

4. *Prohibition—Division Court—Action on County Court judgment.*]—Application for a prohibition to the Judge of the first Division Court of the county of Kent, and to the plaintiffs, to prohibit them from prosecuting this action, which is brought upon a County Court judgment for \$211.87, the plaintiffs abandoning the excess of their claim over \$100, and claiming \$100.

*Held*, that an inferior Court has no jurisdiction to entertain an action brought upon the judgment of a superior Court. *Re Eberts et al. v. Brooke*, 257.

5. *Prohibition—Division Court—Jurisdiction.*]—In an action on a promissory note, brought in a Division Court, M., the indorser, was made a defendant by the order of the Judge, and was served by the original defendant, the maker of the note, with a notice claiming relief over and indemnity, but was not served with the summons or a copy of the plaintiffs' demand. M. filed a notice disputing the defendant's claim against him and the jurisdiction of the Court to try it, and also appeared at the trial, and gave evidence and objected to the jurisdiction. Judgment was given for the plain-



tiffs against both the original defendant and M.

*Held*, that judgment could not have been given against M. in his absence, because the writ of summons and statement of claim had not been served upon him : but that by appearing in the suit and taking part in the proceedings both before and at the trial M. had waived service of the summons and demand.

*Quere*, whether the third party clauses of the O. J. Act apply to Division Courts. *In Re the Merchants Bank v. Van Allen*, 348.

*See* CAUSE OF ACTION, 2--DIVISION COURT, 2, 3.

## PROVISO AND EXCEPTION.

*See* BY-LAW.

## PUBLICATION.

*Petition to open publication—Single Judge—Material evidence.*—A petition by the plaintiffs for leave to produce newly discovered evidence, and to re-open the case for its admission after the judgment of the Court of Chancery in favour of the defendants had been affirmed by the Court of Appeal and the Supreme Court of Canada, was brought on for hearing before Proudfoot, J., in Court.

*Held*, that as the application might, before the O. J. A., have been made to a single Judge, and as there is no provision in that Act specially applicable to the subject, the original practice of the Court remains, and the application was properly made to a single Judge.

*Held*, that upon the discovery of material evidence publication may

be opened even after judgment affirmed by the two Courts above.

The learned Judge here considered that what was proposed to be introduced as new evidence was not material, and dismissed the petition, with costs. *Synod v. DeBlaquiere*, 11.

## RAILWAY COMPANY.

*Railway company—Compensation for land taken—Proof of title—Mandamus.*—Under sec. 6 ch. 67, 45 Vic. (D.), the Midland Railway, as constituted by the Act, is the company, that strangers or persons having claims, &c., upon any of the companies incorporated by the Act, should proceed against for the enforcement of their rights.

The owner of land taken by a railway, is entitled to compensation ; and the company must proceed to settle the amount thereof, under R. S. O. ch. 165, sec. 20 ; if they do not the proper course is to apply for a mandamus.

On such applications a formal title, in the absence of proof to the contrary, need not be proved ; it is sufficient if the applicant swear that he is the owner of the land taken.

The notice of motion was addressed to the Midland Railway Company, and the Grand Junction Railway Company, and to the Presidents and Directors of each, and asked for relief against all or either.

*Held*, that sec. 17, ch. 52, R. S. O. contemplates the calling upon any party who may be affected by the writ, if issued, to shew cause why it should not issue, and therefore the notice was not objectionable as being in the alternative. *Demorest v. The Midland Railway of Canada et al.*, 73.

## RECOGNIZANCE.

See BY-LAW.

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## RECORD.

*Trial—Postponement of—Second payment of fee on entering record.]—*

Where the trial of a cause was postponed till the next assizes, defendants to pay the costs.

*Held*, that no second fee was payable to the deputy clerk of the Crown upon entry of the action for trial at the later assizes, and that when so paid by plaintiff, such fee was not taxable against defendants. *Morton v. Grand Trunk Railway Company*, 62.

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## REFERENCE.

*I. Reference — Official Referee—Special findings—Objections to—Secs. 47 and 48 O. J. A.]—*At the trial of this action a compulsory order of reference was made, referring "all questions arising upon the pleadings in this action between the parties, including all questions of account, (if any)," to an Official Referee "for enquiry and report."

*Held*, that this was a reference under sec. 47 O. J. A., and not one under sec. 48, and the Referee having made a general finding by his report, (set out in the statement,) the case was referred back to him to give specific findings.

*Held*, also, that objections to special findings in a report must be raised by notice of motion. *Luney v. Essery*, 285.

*2. Master-in-Chambers—Local Masters—County Judges—Jurisdiction of—Rule 422, sections 47 and 48, O. J. A.]—*The Master-in-Chambers,

and local Masters and County Judges, acting under Rule 422 O. J. A., have no jurisdiction under sections 47 and 48, O. J. A., to order references in opposed cases. *White v. Beemer*, 531.

*3. Reference under sec. 47 O. J. A.—Jurisdiction of Master in Chambers—Rule 323 O. J. A.]—Held*, following *White v. Beemer*, ante p. 531, that the Master-in-Chambers has no jurisdiction to order a reference under sec. 47 O. J. A.

An appeal from the Master's order directing a reference was treated as a substantive motion, and a reference was directed, under Rule 323 O. J. A. *The Union Loan and Savings Co. v. Boomer*, 630.

See ADMINISTRATION, 3—CORPORATIONS, 6—DOWER, 1.

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## REGISTRATION.

See VENDOR AND PURCHASER, 3.

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## REGISTRAR OF DIVISIONAL COURT.

*Striking out part of defence — Powers of Registrar.]—*The Registrar of a Divisional Court has power to receive evidence by affidavit to shew that an order of Court has not been obeyed, and to enforce the order by striking out paragraphs of the defence. *Hamilton Road Co. v. Flatt*, 581.

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## REHEARING.

*Divisional Court — Appeal — Further directions—Rules 317, 510 O. J. A.]—*The action was not tried, but was referred to the Master,

further directions and costs being reserved. After report made the case was heard on further directions before Proudfoot J.

*Held*, that the case could not be reheard before the Divisional Court, as the proceedings taken could not be regarded as the trial of an action within the meaning of Rules 317 and 510 O. J. A.

When a case is improperly set down to be reheard, a substantive motion should be made to strike it out. *Wansley v. Smallwood*, 233.

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### REMANET.

*See* NOTICE OF TRIAL, 6.

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### RENT.

*See* CORPORATIONS, 7 — IMPROVEMENTS UNDER MISTAKE OF TITLE.

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### REPORT.

*Report — Execution — Appeal — Mistake.*]—A decree directed a reference to a Local Master to ascertain such sums as would be sufficient to satisfy the damages complained of, awarded costs and directed payment to be made forthwith after the making of the report.

*Held*, that the report did not require confirmation, and therefore that executions issued under it by the plaintiff were valid; but pending an appeal from the report the executions were stayed in the sheriff's hands.

The solicitor for the defendants (except Lewis) had given due notices of appeal, but through inadvertence set down the appeal on behalf of the defendants the Gravel Road Company only.

Under the circumstances stated in the judgment, the other defendants were allowed to set down their appeal. *Lewis v. The Talbot-St. Gravel Road Co. and others*, 15.

*See* APPEAL, 1.

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### RETAINER.

*See* CORPORATIONS, 2.

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### REVIVOR.

*See* NOTICE OF TRIAL, 2.

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### ROAD.

*See* MUNICIPAL COUNCIL.

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### SALE.

*See* VENDOR AND PURCHASER, 1.

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### SECURITY FOR COSTS.

1. *Security for costs — Præcipe order for—Setting aside — Stay of proceedings.*]—A defendant is not necessarily entitled to security for costs because the plaintiff's residence is out of the jurisdiction.

If it be made apparent by evidence, which the Court should look at, that the defendant has no defence, security will not be ordered.

The defendant admitted on his examination in this cause, that he owed the debt sued for, but he afterwards alleged a counterclaim for illegal arrest by the plaintiff in the course of this action.

*Held*, that under these circumstances, the defendant was not entitled to security for costs, and a *præcipe* order for security was set aside, with costs.

*Held*, that a *præcipe* order for security for costs is a stay of proceedings while it exists, and a motion for judgment made simultaneously with the motion to set aside the *præcipe* order for security for costs was refused. *Doer v. Rand*, 165.

2. *Security for costs — Past and future—Plaintiff leaving the jurisdiction permanently pending action.*]—Where a plaintiff leaves the jurisdiction permanently while his action is pending he will be ordered to give security for costs past as well as future. *Hately v. The Merchants Despatch Transportation Company et al.*, 253.

3. *Security for costs—Action on behalf of others—Financial incompetency of plaintiff.*]—Security for costs was ordered in an action brought by a ratepayer for himself and the other ratepayers to restrain the delivery by the corporation of certain debentures to a railway company, where it appeared from the examination of the plaintiff that he was financially incompetent to pay the defendants' costs, and was only interested to an insignificant extent; and where he swore that he expected certain persons named to pay his costs and to protect him should the case go adversely, that he did not want to spend any money on the prosecution of his own right in the matter, and that he did not know who instructed the plaintiff's solicitor. *Clarke v. St. Catharines*, 205.

4. *Security for costs—Meritorious defence.*]—Security for costs will not be ordered when the defendant has admitted the cause of action; and it is not essential that the admission should be in the action, on the pleadings, or in any technical form.

The plaintiff swore that there was no defence on the merits, and produced a letter received from the defendant before action, promising to pay the claim sued on.

*Held*, that this uncontradicted or explained warranted the conclusion that there was no defence.

*Bank of Nova Scotia v. LaRoche*, 9 P. R. 503, not followed. *Anglo American Casings Co., (Lim.) v. Rowlin*, 391.

5. *Security for costs.*]—Where several parties suffer damage from the acts of the defendant, and they agree among themselves to share the costs of a test action by one of them to establish his rights, security for costs will not be ordered even though such a plaintiff is insolvent.

*Clark v. St. Catharines*, ante p. 205, distinguished. *Clarke v. Rama Timber Transport Co. (Lim.)*, 384.

6. *Master's office — Security for costs—Creditors.*]—Parties residing out of the jurisdiction who come into the Master's office in an administration action pursuant to a notice to creditors, and claim to be creditors of an estate administered there, will be required to give security for costs. *Re Rees — Urquhart v. Toronto Trusts Co.*, 425.

7. *Security for costs — Præcipe Order—Rule 431, O. J. A.*]—The defendant having obtained on *præcipe* an order for security for costs, a local Judge allowed the plaintiff to pay \$200 into Court in lieu of giving



a bond for \$400, and afterwards ordered a further payment of \$50, but refused to increase the latter sum. An appeal from the order of the local Judge was dismissed, as \$250 appeared to be sufficient.

*Quære*—Whether there is any power to fix the amount at less than \$400, where a *præcipe* order under Rule 331, O. J. A. has been taken out. *North v. Fisher*, 582.

8. *Security for costs.*—A defendant is entitled to security for costs from a plaintiff whose permanent residence is foreign, if at the time application is made the plaintiff is actually out of the jurisdiction. *Robertson v. Cowan et al.*, 568.

9. *Security for costs—Penal action—Time for application for—C. L. P. Act sec. 71—Rule 429, O. J. A.*—In a penal action brought by a common informer, an order for security for costs under sec. 71 of the C. L. P. Act, was held to have been properly made after the statement of defence had been delivered, and after the parties had been examined, as authorized by Rule, 429, O. J. A., but, *Held*, that the order should direct that security should be given “for the costs to be incurred in such suit or action,” following the words of sec. 71. *Budworth v. Bell*, 544.

10. *Money in Court—Security—Payment out.*—On the 16th November, 1881, an order was made directing D. to pay a certain sum of money into Court. D. appealed from this order to the Court of Appeal, and for the purpose of staying execution, instead of giving security, as required by R. S. O. c. 38, sec. 4, he paid this sum into Court, being authorized so to do by an order in Chambers. On the 27th October,

1883, the Court of Appeal reversed the order of 16th November, 1881. The respondents then gave notice of appeal to the Supreme Court of Canada.

*Held*, that the money paid in by D. must be taken to have been so paid in lieu of the bond required by the statute; that when the decision in appeal was given in D.’s favour, the money had served the purpose for which it was paid: and that it ought to be repaid. *Re Donovan, Wilson v. Beatty*, 71.

11. *Appeal—Security for costs.*—An application for further security for costs of appeal, on the ground of the insolvency of one or more of the securities, should be made to the Court appealed from. *Lumsden v. Davis*, 10.

12. *Security for costs—Application for—Affidavits on information and belief—Shewing state of cause.*—An affidavit filed by the defendant set out that “the said plaintiff has been been for some time past, and is now residing, as I am informed and believe, out of the Province of Ontario, and beyond the jurisdiction of this Court, having taken up his residence in New York, one of the U. S. A.”

*Semble*, that a statement of the plaintiff’s residence out of the jurisdiction, on information and belief is not sufficient.

*Held*, that the foreign residence of the plaintiff was here positively sworn to, and the affidavit was sufficient in substance for the Court to act upon in ordering security for costs.

*Quære*, whether in a proceeding before him, a County Court Judge can of his own motion examine proceedings pending in a Division of



the High Court, but *held* that the defendant should have been allowed to produce such proceedings in order to meet technical objections as to the state of the cause not being shewn. *Hollingsworth v. Hollingsworth*, 58.

See COSTS, 12—INSURANCE—INTERPLEADER, 6—STAY OF PROCEEDINGS.

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### SEIZURE.

See INTERPLEADER, 5.

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### SEQUESTRATION.

See MANDAMUS.

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### SERVICE.

*Substitutional service—Local Judge—Rule 422, O. J. A.*]—Two of the defendants lived in Chicago, Ill., and had no solicitor in the county where the action was begun.

*Held*, that the local Judge of the county in which the action was begun had no jurisdiction under Rule 422, O. J. A., to make an order for substitutional service of process on these defendants. *Locomotive Engine Company v. Copeland et al.*, 572.

See CAUSE OF ACTION, 1—EXAMINATION, 2—NOTICE OF TRIAL, 1

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### SETTLING MINUTES OF JUDGMENT.

See JUDGMENT, 4.  
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### SET-OFF.

*Trespass—Set-off—Administration.*]—In an action of trespass for entering the warehouse of a deceased person (of whom the plaintiff was the administrator) after his death and taking and converting the goods therein, the defendant set off a debt due by deceased to him.

An administration order had been made of which the defendant had notice before defence.

The set-off was held bad under 27 Vic. ch. 28, sec 28, and also because of the administration order. *Monteith v. Walsh*, 162.

See COSTS, 4—DIVISION COURT, 2.

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### SHERIFF.

1. *Interpleader—Sheriff.*]—The sheriff seized the goods in question on the 31st day of January, 1883, and on the 1st of February was notified of a claim by an assignee of the judgment debtor, (the assignee being an officer employed by the sheriff) and on the same day the plaintiff's solicitors directed him to sell. The sale took place on the 12th of February, and on the 13th of February the sheriff received the money arising therefrom. On the 26th of February, the sheriff informed the plaintiff's solicitors that the solicitors for the assignee forbade him to pay over the proceeds, and on the 2nd of March the plaintiff received a notice from the assignee's solicitors, that they were instructed to sue him. On the 5th of March notice was given of the application for an interpleader order. The sheriff retained in his hands the proceeds of the sale, and his affidavit, filed on the interpleader application,

referred to a conversation which he had had with the claimant's solicitor, in which the latter told him that the claimant did not propose to claim the goods, or interfere with their sale, but would contest the right of the plaintiff to the money arising from the sale, which was to remain in the sheriff's hands. The sheriff also swore that he related what the claimant's solicitors had said to the plaintiff's solicitor. The sheriff's excuse for his delay from the 13th of February to the 5th of March, was, that he did not understand that it was his duty to take the initiative.

*Held*, that the sheriff sold with the consent of both parties and did not therefore improperly exercise his own discretion so that the contest properly arose as to the proceeds of the sale.

*Held*, that the delay from the 13th February to the 5th March, no opportunity of trial being lost, was not unreasonable.

*Held*, that the fact of the claimant being an officer in the employment of the sheriff, made no difference.

*Per* BOYD, C.: The disposition of the Court is to be more liberal in relieving the sheriff now than formerly. *Darling v. Collatton*, 110.

2. *Sheriff's fees — Rent — Taking stock — Possession money — Appeal from local Master's taxation — Rule 447, O. J. A.*]—Writs of execution had been placed in the hands of the sheriff of Hastings, under which he made a levy on goods in Belleville and Madoc, leaving them on the premises in which he found them. After the service, which was on the 12th of February, and while the goods were in the debtor's premises, two instalments of rent fell due, on the 1st of March and June, which were paid by the sheriff.

*Held*, that this payment should not be allowed, because the goods might have been removed by him before the rent fell due, and being under seizure, they were not liable to distress, and there was nothing in the debtor's lease to accelerate payment of rent on seizure of his goods.

The sheriff paid persons at Belleville and at Madoc for "taking stock" after the levy.

*Held*, that these payments should be disallowed, as they do not appear in tariff, and the local Master was precluded by R. S. O., ch. 66, sec. 51, from allowing anything to the sheriff which was not correct and legal.

It appeared that the deputy-sheriff kept the keys of the store in Belleville, and went himself twice a day to see that the goods were safe.

*Held*, that the payment to him of \$2 per day as possession money should have been allowed only if the Master were satisfied that it was necessarily and actually paid, and the item was referred back for reconsideration, it being alleged that the only possession was locking-up the store and keeping the key.

*Held*, also, that the sheriff was entitled to charge poundage upon each of several writs, though all were issued by the same solicitor, and were placed in his hands at the same time.

*Held*, also, that the plaintiff properly applied to a Judge in Chambers to review the taxation pursuant to R. S. O. ch. 55, sec. 52, as rule 447 applied only to the Toronto taxing officers appointed under Rule 438, O. J. A. *Grant v. Grant*, 40.

*See* CREDITORS' RELIEF ACT, 1880, —INTERPLEADER, 1, 2, 5, 6, 7, 8, 9.

## SOLICITOR AND CLIENT.

1. *Solicitor—Settlement of action by parties—Fraud on solicitor—Solicitor's rights and remedy.*—A settlement of an alimony action after judgment for permanent alimony, upon which writs of execution were in the sheriff's hands, was effected between the parties without the intervention of the solicitors on the record. To carry out the settlement a third solicitor was instructed to withdraw the writs from the sheriff's hands, which he did without paying the costs of the plaintiff's solicitor, which he knew were unpaid. There was no collusion or actual fraud against the plaintiff's solicitor proved.

*Held*, that the plaintiff's solicitor had control of the writs in the sheriff's hands to the extent of his unpaid taxable costs, and that he was entitled to have the writs replaced, or new writs placed in the sheriff's hands at the expense of the solicitor who withdrew them and the plaintiff, or to an order directly against the defendant for payment of his unpaid taxable costs, and for the costs of the motion against the plaintiff and the solicitor who withdrew the writs; but that he was not entitled to an order for payment of his unpaid costs by the solicitor or the sheriff. *Friedrich v. Friedrich*, 308. Affirmed on appeal with variation, 546.

See BILL OF COSTS, 1, 2, 3—COSTS, 10—LIEN.

## SPECIAL CIRCUMSTANCES.

See COSTS, 10—BILL OF COSTS, 2.

## SPECIAL EXAMINER.

*Examination—Presence of parties—Special examiner.*—A special examiner has authority to exclude one defendant from his office during the examination of the co-defendant, at the request of the plaintiff. *Culverwell v. Birney*, 575.

## SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER, 4.

## STAKEHOLDER.

See BETTING.

## STATEMENT OF CLAIM.

See TRIAL, 2.

## STATUTE OF LIMITATIONS.

See LEGATEE—MORTGAGEE, 1.

## STAY OF PROCEEDINGS.

*Action upon appeal bond—Staying proceedings.*—An action against the sureties upon a bond given by the defendants in the action of *McLaren v. Canada Central Ry. Co.*, upon the appeal of the defendants to the Court of Appeal in that cause. The defendants in *McLaren v. Canada Central*, appealed from the Court of Appeal to Her Majesty in Council, and in that appeal security had been given and allowed, including security for the whole amount recovered, and execution had been stayed in consequence.

*Held*, that proceedings must also be stayed in this action. *McLaren v. Stephens*, 88.

See ACTION—SECURITY FOR COSTS, 1.

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### SURETY.

See COSTS, 14—COUNTER CLAIM, 1.

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### SURPLUS.

See COSTS, 9.

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### SURROGATE COURT.

See COSTS, 8.

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### TAXATION.

*Certificate of taxation—Rules 437, 448, O. J. A.—Appeal.*]—Upon the issuing of a certificate of taxation, a taxing officer is *functus officio*, and it is only when the Court requires information that he should further certify.

An appeal from a certificate of taxation will not lie until the certificate has been filed.

Under Rules 437 and 448, O. J. A. a taxing officer may issue a certificate of his ruling on any points in dispute pending the taxation, and upon it an appeal may be had, but his right to issue such certificate ceases when he has issued his final certificate. *Langtry v. Dumoulin*, 444.

See BILL OF COSTS, 1, 2, 3—CORPORATIONS, 2—COSTS, 10, 11, 12, 13—SHERIFF, 2.

### TAXING OFFICER.

See CORPORATIONS, 2—TAXATION—COSTS, 1, 2, 5, 13.

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### TENANT-IN-COMMON.

*Tenants-in-common — Rent—Execution creditors — Priority.*]—The plaintiff was tenant-in-common with the defendants, and was proved to have received more than his proper share of the rent. The defendants claimed against the plaintiff's share of the land, for the excess of rent received by the plaintiff. There were executions in the sheriff's hands, and the execution creditors had come in under the decree in the cause.

*Held*, that the defendant's claim being simply for a debt for which an action might be brought, there was no actual charge until a judgment was obtained.

That the execution creditors did not lose their priority by coming in under the decree, and were entitled to have it maintained.

And that the case was not varied by some of the defendants being infants. *McPherson v. McPherson*, 140.

See IMPROVEMENTS UNDER MISTAKE OF TITLE.

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### TENDER.

*Tender — Payment into court—Judgment—O. J. A.*]—The action was to recover money as compensation for land expropriated, and for other relief. Defendants pleaded a defence in denial, and also a tender of \$400 and interest, but did not pay the amount into Court.

*Held*, that the defence of tender without payment into Court was a



good defence under the Ontario Judicature Act, and a motion to strike out the defence, or to compel payment into Court, or for judgment for the amount, with leave to proceed for a further amount, was refused. *Demorest v. Midland Railway Company, et al.*, 640.

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### TESTATOR.

See ADMINISTRATION, 2.

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### THIRD PARTY.

1. *Third party—Amendment.*]—A cheque had been drawn upon the plaintiffs, payable to the Hamilton Tool Company, and upon an endorsement, purporting to be that of the Tool Company, the defendants cashed the cheque and upon presentation by them to the plaintiffs, were repaid the amount

The Tool Company repudiated the endorsement. The defendant's solicitor swore that he had good reason to believe, and did believe that a third party was the beneficial plaintiff, and that there were equities which would attach as against the present plaintiffs.

Leave to add such third party was refused, but leave was given to the defendants to amend by alleging that the third party was the beneficial plaintiff, and to set up any defence that might be open to them on that ground. *Bank of Commerce v. Bank of British North America*, 158.

2. *O. J. A. — Rules 107, 108—Third parties—Appeal from Judge—Rule 414.*]—In an action for the non-delivery of coal, one of the defendants gave notice to S. & M.,

under the first part of Rule 107 and Rule 108, of the action, and that he claimed contribution from them to the extent of one half of any sum recovered against him on the ground that they were co-partners in the transaction, &c. S. & M. appeared to this notice, and the Master in Chambers subsequently made an order giving them leave to appear, and directing that they should be bound by any judgment against the said defendant: *Held*, on appeal from the order of OSLER, J. A., setting aside the order of the Master, that the latter order had been properly made.

The decision appealed from was given on the 14th, and the notice of appeal on the 26th November, the first day of Michaelmas Sittings being the 17th November: *Semble*, that this was an appeal from a Judge, and not a substantive motion to rescind his order, and if so, and Rule 414 was to govern, the appeal was too late; but, *Held*, even so, that the Court would extend the time, as the merits were with the appellant. *McLaren et al. v. Marks et al.*, 451.

See COUNTER CLAIM, 3—PROHIBITION, 5.

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### TIME.

See APPEAL, 1, 2, 3,—ELECTION, 3—MARRIED WOMAN, 1—NOTICE OF TRIAL, 3.

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### TITLE.

See IMPROVEMENTS UNDER MISTAKE OF TITLE.

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### TRESPASS.

See SET-OFF.



## TRIAL.

1. *Trial—Changing place of.*]—The plaintiff lived and carried on business in Toronto, the defendants in Parkhill, near London. The action was brought upon a contract to purchase certain goods obtained by an agent of the plaintiff, who solicited the order in Parkhill where the contract was signed. The goods were to be delivered by the plaintiff to the Grand Trunk Railway Company in Toronto. The defence set up fraud in obtaining the contract. The plaintiff proposed to have the action tried at Toronto. The defendants swore that they intended to call six witnesses: that the cause of action arose in Parkhill: and that the expense of a trial at Toronto would be greater by \$30 than at London. The plaintiff swore that he intended to call six witnesses and give evidence himself: that four of the six lived in Toronto, one east of Toronto and one in Parkhill: and that the extra expenses of a trial at London would be about \$25.

*Held*, that the cause of action arose in Toronto, and that there was no such preponderance of convenience in favour of London as would justify a change of the place of trial following *Noad v. Noad*, 6 P. R. 48, *Davis v. Murray*, 9 P. R. 222, and *Robertson v. Daganeau*, 19 C. L. J. 19. Appeal allowed, and place of trial restored to Toronto. *Walton v. Wideman et al.*, 228.

2. *Amending statement of claim—Changing place of trial—Rule 179, O. J. A.*]—The plaintiff having in his statement of claim named Toronto as the place of trial, afterwards amended it on *præcipe* under rule 179, O. J. A., naming Belleville as the place of trial.

*Held*, on appeal, affirming the decision of the Master-in-Chambers, and following *Frietsch v. Winkler*, 3 Ch. Chamb. R. 109 (decided under Chy. G. O. 81, which is substantially the same as rule 179), that no change of the place of trial could be made by amendment of the statement of claim. *Bull v. North British Canadian Investment Company (Limited) et al.*, 622.

3. *Changing place of trial.*]—A motion to change the place of trial in a County Court action from London to Toronto was refused under the following circumstances:

The action was on a promissory note made and payable at Toronto. The plaintiff resided in Montreal, and his solicitor in London. The sole defence was that the defendant was discharged from liability under the Insolvent Act. The defendant resided in Toronto, and swore that he intended to call two witnesses, the Clerk of the County Court at Toronto, and the assignee of the defendant who also lived there. The plaintiff filed no affidavit on the motion. *Slater v. Purvis*, 604.

4. *Venue—Master in Chambers—Jurisdiction of—County Court action—R. S. O. ch. 50, sec. 155, and ch. 39 sec. 31—Rules 420-427 O. J. A., ss. 3, 9 and 12 O. J. A.*]—The plaintiff in a County Court action laid his venue at Toronto. The Master in Chambers changed it to—

On appeal, *BOYD, C.*, discharged the Master's order on the undertaking of the plaintiff to pay the extra expense (\$25 or \$30) of a trial at Toronto.

*Semble*, The Master in Chambers has not jurisdiction to change a venue under R. S. O. ch. 50, sec. 155, as the rule of Court passed 1st

February, 1870, under the authority of 33 Vic. ch. 11, delegates to the Master only the jurisdiction the Judges of the Superior Court then possessed in certain matters, and it was not till the passing of 35 Vic. ch. 10 (1872), that Superior Court Judges had jurisdiction in such matters in County Court actions.

Nor has the Master in Chambers power under Rule 420 O. J. A., as that is limited to "actions and matters" in the High Court, and a motion of this kind is neither "matter" nor "proceeding" (sec. 91 O. J. A.) in the High Court.

No objection to his jurisdiction was taken before the Master however:

*Held*, that the application having been entertained, an appeal to a Judge in Chambers, of the Chancery Division, instead of to a Judge of the C. P. or Q. B. Divisions, was proper under R. S. O. ch. 39 sec. 31, and Rule 427 O. J. A. the effect of the O. J. A. being to abolish all distinctions between Superior Courts of Law and Equity. *Brigham v. McKenzie*, 406.

See COSTS, 2—ELECTION, 3—RECORD.

### TRUSTEE.

See INSURANCE.

### VAGRANT ACT.

*Conviction*—*Vagrant Act*, 32 & 33 Vic. ch. 28, D.]—The defendant registered his name and address at the American Hotel, Toronto, and on the same day was arrested at the Union Railway Station, having been pointed out to the police by some of the

railways' officials as a suspicious character. On his person were found two cheques one for \$700 the other for \$900, which were sworn to be such as used by "confidence men," a mileage ticket nearly used up in favour of another person, and \$8 in cash. He offered no explanation of the cheques or the ticket, and gave no information about himself.

*Held*, that the Vagrant Act did not warrant his arrest, much less his conviction.

Before a person can be convicted of being a vagrant of the first-class named in the Act ("All idle persons who not having visible means of maintaining themselves live without employment") he must have acquired in some degree a character which brings him within it as an idle person, who having no visible means of maintaining himself, *i.e.* not "paying his way or being apparently able to do so," yet lives without employment. *Regina v. Bassett*, 386.

### VACATION.

See APPEAL, 1.

### UNDERTAKING OF SOLICITOR.

See CAUSE OF ACTION, 1.

### VENDOR AND PURCHASER.

1. *Purchaser*—*Judicial sale*—*Delivery of possession*—*Growing crops*—*Knowledge by purchaser of tenancy*.]—At a judicial sale of a farm, the conditions of sale were the usual conditions of the Court, providing

for the delivery of possession to the purchaser upon payment of the balance of the purchase money one month after the sale. The purchaser lived upon a part of the lot which was not sold, and was aware that the farm sold was occupied by a tenant, but swore that he did not know the terms of the tenancy, that he relied upon the conditions of sale, and that he bid more for the land because there were growing crops thereon. The purchaser paid the balance into Court at the proper time, but did not get possession then, nor had he got possession at the time of this application, January 7th, 1884.

*Held*, that the vendors were bound by the terms of the printed and published conditions of sale, and that it was not the business of the purchaser to acquaint himself with the terms of the tenancy, and by enquiry to ascertain whose were the crops. Order made as asked, with a reference as to compensation. *Munson v. Manson*, 155.

2. *Objections to title—Amendment—Jurisdiction of Master—Mistake of purchaser's solicitor—Additional objections.*—By an agreement for the sale of certain land, the vendor was to give a good marketable title of which the purchaser was to satisfy himself at his own expense, and was not to call for any abstract of title, deeds, or evidences of title other than those in the vendor's possession.

Subsequently on a reference in a suit by the vendor for specific performance, the defendant filed three objections to the title having reference to a small portion of the land, which were answered by the plaintiff, and the reference was proceeding when the defendant applied and

obtained from the Master leave to file other objections.

On appeal *PROUDFOOT, J.*, *Held*, that the Master in Ordinary had no jurisdiction to grant such leave, but on a subsequent application to the Court he gave the leave required on terms. *Clarke v. Langley*, 208.

3. *Vendor and purchaser—Registration—Cloud upon title*—The registration of any instrument which casts doubt or suspicion on the title, or which embarrasses the owner in maintaining his estate, or in disposing of his property, is a cloud upon the title against which the Courts will relieve. And in such case it is sufficient if there is a registered instrument apparently valid on its face, accompanied by a claim of title, although an intruder on the claim of title, which is likely to work mischief to the real owner.

A purchaser at a sale of lands held under an order of Court objected to the title on the ground that four deeds had been registered against half of the lot by parties who apparently had no title, but one of whom had notified the purchaser that he claimed some interest in the lands.

*Held*, that such registered deeds were clouds upon the title, and that the purchaser could not be compelled to take it. *Keefer v. McKay*, 345.

4. *Vendor and purchaser—Specific performance—R. S. O. ch. 109.*—If under R. S. O. ch. 109, the Court adjudicates upon a question of title between vendor and purchaser, and directs the purchaser to carry out his contract, and the purchaser then fails to carry out the contract, it is unnecessary to bring an action for specific performance of the contract; the requisite relief may be had on notice of motion for payment of the

purchase money, or in default a resale, &c. *Re Craig*, 33.

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### VENUE.

*See* ADMINISTRATION, 3—TRIAL, 1, 2, 3, 4.

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### WAIVER.

*See* PROHIBITION, 5.

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### WILL.

1. *Will—Devise of land subject to annuity and life estate—Effect of.*]—A testator gave his son A. his board and lodging and £5 a year during his natural life. He devised to his eldest son a portion of his real estate on condition of his paying A. £3 out of the £5 a year. He further devised another portion of his real estate to his wife for her life, and then to his son R., on condition that R. should pay the balance, £2 a year, and keep his son A. in board and lodging during his natural life.

*Held*, that the annuity to A., though chargeable against different parties, was not separable. (2) That the intention of the testator was to provide for A. from the time of the testator's death, and that R.'s land was chargeable with such £2 a year, and the board and lodging from that time, notwithstanding the tenancy for life. *Munsie v. Lindsay*, 432.

2. *Will—Legacy—Directions to executors to pay—Charge on real estate.*]—A testator devised his real estate and chattel property (excepting some bequests to his wife) to his

son Robert, subject to the payment of his just debts, funeral expenses, and certain specified legacies, which legacies he directed his executors to pay.

By a codicil he directed the chattel property (except the specific bequests to his wife) to be sold, and the proceeds equally divided amongst all his children.

*Held*, that the specific legacies were a charge on the real estate. *Stewart v. Dick*, 411.

*See* ADMINISTRATION, 5.

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### WITNESS.

*See* COSTS, 2—ELECTION, 2—EXAMINATION, 4, 5, 7, 12 — FOREIGN COMMISSION, 1, 2, 3—HUSBAND AND WIFE, 1.

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### WITNESS DE BENE ESSE.

*See* EXAMINATION, 7.

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### WORDS AND TERMS.

"Vacation."—*See Blake v. Building and Loan Association*, 153.

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### WRIT OF ATTACHMENT.

*Writ of attachment binds land from seizure—What is a seizure.*]—The mere fact that a writ of attachment an absconding debtor is in the sheriff's hands does not bind the debtor's land, and the land is not bound until seizure.

The sheriff's bailiff went to and entered upon the land of the debtor on which his family resided, and finding there no goods, did not leave any one in possession; he said that he had no instructions beyond the warrant to seize the land; he told



the debtor's wife at the time that the land would be sold, but he did no other act of seizure.

*Held*, that there was no seizure, and that *fi. fa.* lands placed in the sheriff's hands subsequent to the writ of attachment, were entitled to priority. *Robinson v. Bergin*, 127.

WRITS OF FI. FA.

*See* WRIT OF ATTACHMENT.

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WRIT OF SUMMONS.

*See* ENDORSEMENT.

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